



MAINE REVENUE SERVICES SALES, FUEL & SPECIAL TAX DIVISION INSTRUCTIONAL BULLETIN NO. 38

ADVERTISING AGENCIES AND GRAPHIC DESIGNERS

This bulletin is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges. It contains general and specific information of interest as well as interpretations and determinations by Maine Revenue Services regarding issues commonly faced by your business. Portions of the Sales and Use Tax Law referred to in this bulletin can be found at the end of the bulletin in Attachment #1. Also attached are applicable Sales and Use Tax Rules.

Advertising agencies and graphic designers that make sales of tangible personal property and/or fabrication services are required to register as sellers with the State Tax Assessor and to collect, report and remit the Maine sales tax on taxable sales to their clients. Advertising agencies and graphic designers should pay sales tax to their suppliers when purchasing tangible personal property that will be used by the agency rather than resold. If the supplier does not collect the tax, the purchaser must report and pay use tax directly to the State on purchases for use in Maine.

Full service agencies may, at different times, purchase property for resale to clients, act as purchasing agents for their clients, incorporate materials into property produced for a client, or make purchases of property for use by the agency in its performance of contracts with clients.

I. Definitions:

- A. Fabrication Services.** The term "fabrication services" is defined in §1752(2-C) of the Sales and Use Tax Law (please see Attachment No. 1). A sale of fabrication services occurs only when tangible personal property is produced from materials provided by the client. An advertising agency or graphic designer that provides the materials used in the production of tangible personal property for its clients is making sales of tangible personal property, not fabrication services. By defining and taxing fabrication services, the law clarifies that services which ordinarily are a part of the sale price of tangible personal property are taxable regardless of who provides the materials.
- B. Purchasing Agent.** The term "purchasing agent" is not defined in the Sales and Use Tax Law. As used in this Bulletin, "purchasing agent" means a person (such as an advertising agency) that is authorized to act on behalf of another person (its client or "principal") in acquiring property or services from a third party. A purchasing agent makes purchases on behalf of its client, as opposed to a retailer which makes purchases on its own behalf for resale to the client.

Ordinarily, when an advertising agency purchases property or services, it is not acting as a purchasing agent on behalf of its client but is making purchases for resale to a client or for its own use in the performance of a contract with the client. An advertising agency is not acting as a purchasing agent when it acquires materials that will be incorporated into tangible personal property prepared by its employees for the client, nor when it provides consultation, creative services, or supervision of employees in connection with the production of tangible personal property for the client. When transferring to clients tangible personal property acquired from third parties, it will be presumed that an advertising agency is acting as a retailer unless it can be established that it acted as a purchasing agent in the acquisition.

To establish that an advertising agency is acting as a purchasing agent with respect to a particular purchase, the agency must:

1. establish it has the authority to bind the principal with respect to the purchase;
2. clearly disclose to the vendor the name of the client for whom the agency is acting as purchasing agent;
3. obtain, prior to the purchase, and retain sufficient written evidence of the advertising agency's status as purchasing agent;
4. bill the client at a price, exclusive of an agency fee, which is the same as the amount of the bill from the vendor;
5. separately state any such fee; and
6. make no use of the property for itself or for any client other than the principal, and make no charge for the item except to the account of the client who is the principal.

C. Sale Price. The term "sale price" is defined in section §1752(14) of the Maine Sales and Use Tax Law (please see Attachment No. 1). The Maine sales tax is imposed on the "sale price" of tangible personal property and taxable services. Consequently, whenever there is a sale of tangible personal property or a taxable service, it is necessary to determine the "sale price" of the property or service in accordance with this definition in order to compute the tax. The amount charged to the client for services which are a part of a sale of tangible personal property, and costs incurred by the agency in the performance of a contract for production of tangible personal property, are a part of the taxable sale price of the property whether or not they are separately stated in the billing to the client.

D. Tangible Personal Property. The term "tangible personal property" is defined in §1752(17) of the Maine Sales and Use Tax Law (please see Attachment No. 1). Collateral materials (such as catalogs, brochures and pamphlets), art work (such as photographs, drawings, paintings, designs and lettering), and production items (such as engravings, duplicate plates, mechanicals, assemblies and sound recordings), are all examples of tangible personal property commonly produced by advertising agencies and graphic designers. When tangible

personal property is produced for a client sales tax is computed on the entire sale price of the property, including any services that are a part of the sale, without deduction for any costs or expenses incurred by the seller.

II. Purchases By Advertising Agencies and Graphic Designers

Advertising agencies and graphic designers should pay sales tax to their vendors on all purchases of tangible personal property used by the agency rather than resold, unless the purchase is exempt under one of the provisions discussed below. If the supplier does not collect the tax, the purchaser should report and pay use tax directly to the State on purchases for use in Maine.

A. Purchases for Incorporation in Work

Property which becomes an ingredient or component part of tangible personal property sold by the agency or artist is purchased for resale, not for consumption. Any item that becomes physically an ingredient or component part of tangible personal property sold by the agency or artist, such as illustration board, paint, ink, flap paper, photographs, photostats, or art purchased from other artists should be purchased tax-free by furnishing the supplier with a "Blanket Certificate of Exemption."

B. Purchases for Resale

When an advertising agency or graphic designer does not have the authority to act as a purchasing agent, items it purchases for resale to the client may be purchased tax-free by furnishing the supplier with a "Resale Certificate" in the form set forth in Rule No. 301. The agency or designer must then collect the tax based on the full selling price when the items are resold to the client.

C. Purchases By Purchasing Agents

When an advertising agency or graphic designer acts as a purchasing agent, it is not purchasing items for resale to the client. All vendor invoices for goods and services, including sales tax where required, will be billed directly to the client.

D. Purchases For Consumption

An advertising agency or graphic designer is also the consumer of tangible personal property used in its business. The purchase of tangible personal property such as office supplies and equipment, which will be used by the advertising agency or graphic designer rather than resold, is subject to tax. If sales tax is not paid to the supplier at the time of purchase, use tax should be reported and paid directly to the State. Purchases of machinery and equipment for use by the purchaser directly and primarily in the production of tangible personal property for later sale, and purchases of property which will be consumed or destroyed or lose its identity directly and primarily in the production of, tangible personal property for later sale, are exempt from tax.

III. Taxable Sales

A. Tangible Personal Property

Sales tax applies to the entire amount charged to clients for items of tangible personal property such as drawings, paintings, designs, photographs, layouts, audio and video tapes, lettering, assemblies and printed materials such as catalogs, brochures, pamphlets and fliers. Costs incurred by the agency in the production of these items and services performed by the agency which are a part of the production of these items are a part of the taxable sale price of the item, whether or not they are separately stated in the billing to the customer. Whether the items of property are used for reproduction or display purposes is immaterial.

B. Fabrication Services

Sales tax also applies to the total amount charged for production of tangible personal property where the materials are furnished by the customer. Some examples of services which constitute fabrication services when performed on property provided by the customer are retouching of photographs, production of audio or video tapes, production of signs, production of artwork, printing or imprinting of tangible personal property, and binding or folding such items where the materials are furnished by the customer. Bulletin No. 46 contains additional information about sales and use tax on fabrication services.

IV. Nontaxable Sales

A. Preliminary Art

"Preliminary art" means roughs, visualizations, comprehensives and layouts, title to which does not pass to the client, but which are prepared solely for the purpose of demonstrating an idea or message for acceptance by clients before a contract is entered into or approval is given for production or preparation of finished art. ("Finished art" means the final art used for display purposes or for actual reproduction by photomechanical or other processes.) "Preliminary art" also includes sample or "spec" copy prepared for acceptance by the client before a contract is entered into. Tax does not apply to separate charges for preliminary art except where the preliminary art becomes physically incorporated into the finished art, as, for example, when finished art is made by inking directly over a pencil sketch or drawing, or the approved layout is used as camera copy for reproduction.

The charge for preliminary art must be billed separately to the client, either on a separate billing or by separate charge on the billing for the finished art. It must be clearly identified on the billing as preliminary art, of one or more of the types specified in the preceding paragraph. Proof of ordering or producing the preliminary art prior to the date of the contract or approval for finished art shall be by purchase orders of the client, or by work orders or other records of the advertising agency or graphic designer.

B. Nontaxable Services

Tax does not apply to charges by advertising agencies and graphic designers for services rendered **unless those services constitute fabrication services or are a part of a sale of tangible personal property.**

Examples of nontaxable services are:

- Music: music composition; usage rights;
- Public Relations: event planning; writing and editing of news releases; media relations; crisis management; planning and implementation;
- Copy Writing: used in print and broadcast media such as magazines, radio and TV, news releases, and newsletters; usage rights;
- Media: planning; buying of paid media in print and broadcast such as newspapers, magazines, radio and TV, transit such as buses and taxis, kiosks, dioramas and the like; media space and time;
- Graphic Design: usage and buy-out rights;
- Photography: retouching for the sole purpose of repair and restoration; photographic usage rights and cancellation fees;
- Research: compiling statistical and other information such as focus groups; qualitative and quantitative data;
- Account Management: client-related services including marketing analyses and planning; implementation of marketing and advertising programs;
- Miscellaneous: if involved in the rendering of the above services, supervision, directing, consultation, handling, research, telephone and FAX messages, transportation and travel expenses, and postage are nontaxable.

Charges for the above services are exempt when the service is provided by the agency to its client and is not a part of a sale of tangible personal property or fabrication services. If any of the above services is performed as a part of a sale of tangible personal property, or represents a cost incurred by the advertising agency or graphic designer in the production of tangible personal property, it is a part of the taxable sale price of the property.

C. Agency Fee or Commission

An amount billed as an "agency fee," "service charge" or "commission" which represents a charge or part of the charge for any of the nontaxable services described in paragraph IV. B above is not taxable. Fees and commissions paid to a purchasing agent are also nontaxable.

D. Usage Rights and Buyouts

A payment for the right to make use of copyrighted material, either for a specified occasion or in perpetuity, is considered a sale of an intangible and therefore exempt from the tax provided that the rights are sold separately from the material to be used.

Usage rights which represent a cost incurred by the agency in the performance of a contract for the production of tangible personal property for a client may not be deducted from the taxable sale price of the property when billing the customer.

E. Regularly Issued Publications

The Sales and Use Tax Law includes an exemption for sales of "any publication regularly issued at average intervals not exceeding 3 months." This exemption does not distinguish among publications based on content or intended audience, so publications such as employee or client newsletters may qualify for exemption as long as they are dated and issued on a regular schedule at least four times a year. Materials such as advertising fliers which will be actually inserted in and distributed as a part of a regularly issued publication are also exempt. The exemption is not limited to printed materials, so publications which are issued to subscribers in the form of audio or video tapes on a regular schedule at least four times a year are also exempt. Tapes intended for broadcast rather than distribution to subscribers are not "publications," no matter how regular the schedule on which the broadcast occurs.

This exemption is limited to tangible personal property which will be distributed as a regularly issued publication, or which will actually become part of a regularly issued publication. Sales of camera-ready copy or other items which will be used in the production of a regularly issued publication are taxable as in any other case.

F. Transportation charges

Separately stated charges for delivery of tangible personal property directly to the location of the client by common or contract carrier or the US mail are exempt. Delivery is considered to have been made "directly to the location of the client" when final delivery of the finished product is made to a location designated by the client.

The following types of transportation charges are part of the taxable sale price of the property being sold whether or not they are separately stated: charges for delivery of the finished product by the seller rather than by mail or by common or contract carrier; costs of shipping property to the location of the seller (freight in); and costs for transportation incurred by the seller in the performance of its contract with the client (such as delivery of camera copy from the agency to a printer where the printed materials are to be sold to the client by the agency).

V. ADDITIONAL INFORMATION.

The information in this bulletin addresses some of the more common questions regarding the Sales and Use Tax Law faced by your business. It is not intended to be all inclusive. Re-

quests for information on specific situations should be in writing, should contain full information as to the transaction in question and should be directed to the:

**MAINE REVENUE SERVICES
SALES, FUEL & SPECIAL TAX DIVISION
P.O. BOX 1065
AUGUSTA, ME 04332-1065
TEL: (207) 624-9693
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ATTACHMENT #1
Excerpts taken from 36 M.R.S.A.

36 §1752. Definitions

The following words, terms and phrases when used in chapters 211 to 225 have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

2-C. Fabrication services. "Fabrication services" means the production of tangible personal property for a consideration for a person who furnishes, either directly or indirectly, the materials used in that production. "Fabrication services" does not include the production of tangible personal property if a sale to the consumer of the tangible personal property so produced would be exempt or otherwise not subject to tax under this Part or if the services are purchased by an exempt entity.

9-B. Production. "Production" means an operation or integrated series of operations engaged in as a business or segment of a business which transforms or converts personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed.

Production includes manufacturing, processing, assembling and fabricating operations which meet the definitional requisites.

Production does not include biological processes, wood harvesting operations, the severance of sand, gravel, oil, gas or other natural resources produced or severed from the soil or water, or activities such as cooking or preparing drinks, meals, food or food products by a retailer for retail sale. The foregoing are examples of activities that are not included within the term "production."

14. Sale price. "Sale price" means the total amount of a retail sale valued in money, whether received in money or otherwise.

A. "Sale price" includes:

- (1) Services which are a part of a retail sale; and
- (2) All receipts, cash, credits and property of any kind or nature and any amount for which credit is allowed by the seller to the purchaser, without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expenses.

B. "Sale price" does not include:

- (1) Discounts allowed and taken on sales;
- (2) Allowances in cash or by credit made upon the return of merchandise or with respect to fabrication services pursuant to warranty;

- (3) The price of property returned or fabrication services rejected by customers, when the full price is refunded either in cash or by credit;
- (4) The price received for labor or services used in installing or applying or repairing the property sold or fabricated, if separately charged or stated;
- (5) Any amount charged or collected, in lieu of a gratuity or tip, as a specifically stated-service charge, when that amount is to be disbursed by a hotel, motel, restaurant or other eating establishment to its employees as wages;
- (6) The amount of any tax imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer, except any manufacturers', importers', alcohol or tobacco excise tax; or
- (7) The cost of transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, provided that those charges are separately stated and the transportation occurs by means of common carrier, contract carrier or the U

17. Tangible personal property. "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership.

17-A. Taxable service. "Taxable service" means:

- A. Rental of living quarters in any hotel, rooming house, tourist or trailer camp;
- B. Rental, for a period of less than one year, of an automobile;
- C. Telephone or telegraph service;
- D. Extended cable television service;
- E. Fabrication services;
- F. Custom computer programming, including, but not limited to, modification of a standard program; and
- G. Rental of video tapes and video equipment.

36 §1760. Exemptions

No tax on sales, storage or use shall be collected upon or in connection with:

14. Publications. Sales of any publication regularly issued at average intervals not exceeding 3 months.