

Cite as Det. No. 13 WTD 183 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 93-261
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

- [1] RCW 82.04.050; RULE 140: RETAIL SALE -- SALE OF PRINTS -- PHOTOGRAPHER -- PHOTOGRAPHIC FEES. Photographers who sell photographs, slides, and transparencies to their customers must collect retail sales tax on such sales. The retail sales tax also applies to shooting and other fees.

- [2] RCW 82.04.290; RULES 224 AND 140: INTANGIBLE PROPERTY -- COPYRIGHT -- PHOTOGRAPHERS -- SERVICE B&O TAX. A sale by a photographer of only the right to reproduce photographs is a sale of intangible property and, as such, no retail sales tax is due on such sales. The photographer must pay service B&O tax on income derived from such sales.

- [3] RCW 82.04.050; RULE 140: TANGIBLE AND INTANGIBLE PROPERTY -- SALE OF PRINTS WITH REPRODUCTION RIGHTS -- PHOTOGRAPHERS. A photographer who sells prints, slides, and transparencies along with rights to reproduce such works is selling both tangible and intangible property. In general, absent bifurcation, retail sales tax must be paid on the entire purchase price.

- [4] ETB 456.08.143 AND ETB 417.12.144: PHOTOGRAPHIC SERVICES -- SALES TO PRINTERS AND PUBLISHERS -- WHOLESALING B&O TAX. Until modified or withdrawn, Excise Tax Bulletins issued by the Department of Revenue allow a photographer who sells prints with reproduction rights to printers and publishers of magazines, newspapers, and periodicals to take a resale certificate and to charge no retail sales tax. If the

photographer takes resale certificates, he or she should report the income from the sale under the wholesaling B&O tax classification.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Commercial photographer protests the reclassification of photographic sales from retail to service when such sales included the transfer of certain reproduction rights.

FACTS:

Mahan, A.L.J. -- The taxpayer is a freelance assignment photographer His clients include numerous [professionals]. On occasion he sells directly to publishers of magazines and newspapers.

The taxpayer describes the majority of his business as follows:

I am hired to create several images for a client....I retain copyright ownership....The client retains ownership of the prints and/or transparencies and/or slides I deliver. The client is licensed by me (as copyright owner) to use the images for display, marketing and advertising, reproduction in brochures, submission to awards competitions, and submission to magazines for editorial coverage.

His business was audited [and an] assessment . . . was issued. Under Schedule III of the assessment, sales of the right to publish photographs were reclassified from wholesale to the higher service business and occupation (B&O) tax classification. This resulted in the taxpayer owing an additional \$. . . plus interest. Under Schedule IV, sales where the taxpayer charged retail sales tax were reclassified as service and the higher service B&O tax was assessed. This resulted in the taxpayer owing an additional \$. . . plus interest. The auditor concluded with respect to Schedule IV that the prints and transparencies were only "tangible evidence of the professional services rendered" with respect to the transfer of reproduction rights.

Because the auditor's conclusions differ from information the taxpayer believes he and other members of a trade organization

had previously received, he wrote to the Department's Taxpayer Information and Education Section (TI&E). In a [May 1993] letter, a taxpayer information specialist stated that, with the exception of sales of the right to publish, the sales were subject to retail sales tax. This appeal followed.

At the appeal hearing, the taxpayer presented representative invoices where he had charged retail sales tax, but which the auditor had reclassified as service. Each of these invoices included a line item for "Film, Prints & Lab." According to the taxpayer, such a line item signified that it was a sale of prints or transparencies. In addition, under the heading for "Description of Service/Rights Granted/Usage," the taxpayer often granted additional usage rights. For example, the following rights were granted to an architect:

Client is licensed, without time restrictions, to use images for brochures, portfolio, slide presentations, display prints, and editorial coverage in Interior Design magazines with photo credit. Photographer retains exclusive rights to license usage by any third party.

Such rights are commonly referred to as "record and exhibition" usage. The reference to third parties might include the owner or builder of a home who, in addition to the architect, may want to purchase prints or usage rights. Another invoice similarly provided:

Client is licensed to use photos for portfolio, display, awards, and editorial (with photo credit). Photographer retains copyright for all images.

In contrast, on invoices where the taxpayer did not charge sales tax, there was no line item for prints or film and only a grant of usage rights. For example, an invoice to an architect provided:

Invoice for usage rights to publish one black and white photograph in " "

Similarly, another invoice for a sale made directly to a magazine provided:

Client is granted a license to reproduce images of the...residence one-time-only in the April issue of

Neither of these last two sales were reclassified by the auditor.

ISSUES:

1. Should a commercial photographer charge retail sales tax when it sells only prints or transparencies?
2. Should a commercial photographer pay service B&O tax on income derived from the sale of reproduction rights to publishers of newspapers, magazines, and periodicals?
3. Should a commercial photographer charge retail sales tax when it sells prints with certain reproduction rights to customers other than publishers and printers of newspapers, magazines, and periodicals?

DISCUSSION:

The taxpayer creates photographic works. Those works may take tangible form as prints, slides, or transparencies. Upon creation of such works, significant intangible rights are granted under the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*, to the originators of such works. For example, the copyright holder has, for a limited period, the exclusive right to reproduce and distribute copies of the work. 17 U.S.C. § 106. Such intangible rights may have commercial value separate and apart from the tangible work.¹

Sales by the taxpayer may take three different forms: 1) he may sell only the prints or transparencies; 2) he may sell only the right to copy the work; and 3) he may sell the work and include the right to use and copy the work for certain limited purposes. The taxable consequences of each type of sale is discussed below.

1. Sale of Prints.

A retail sale is defined to include:

¹Under the Copyright Act of 1976, the owner of the copyright is the originator of the work, unless the work is a "work made for hire." 17 U.S.C. § 101. A work for hire is work done by either: 1) an employee; or 2) certain independent contractors--such as a contributor to a collective work--where the contracting parties expressly agree in writing that the work is one for hire. *Id.*; see generally, Community for Creative Non-Violence v. Reid, 490 U.S. 703, 104 L.Ed.2d 811, 109 S. Ct. 2166 (1989). If the work is done for hire, the party contracting for the work would be considered the owner of any tangible and intangible property and, accordingly, the work by the photographer would involve only a service. 17 U.S.C. § 201(b). None of the work at issue here involved work for hire.

every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons....

RCW 82.04.050(1). Included within this definition of a retail sale is the imprinting of an image on photographic paper or other media. Det. No. 92-260, 12 WTD 425 (1992).

Included within a retail sale is the:

charge made for...labor and services rendered in respect to the ...imprinting, or improving of tangible personal property of or for consumers....

RCW 82.04.050(2). Accordingly, even though services when rendered by themselves may not be included within the definition of a retail sale, they are treated as a retail sale when rendered with respect to the imprinting or fabrication of tangible personal property for consumers. In this regard a shooting fee has been found subject to retail sales tax when performed in connection with a contract for the imprinting of photographic negatives for a consumer. Det. No. 92-260, 12 WTD 425 (1992).

WAC 458-20-140 (Rule 140), the administrative rule adopted with respect to photographers and photofinishers, provides in general terms:

Photographers who make negatives on special order and sell photographs to customers (other than dealers for resale) must collect the retail sales tax upon such sales.

In this case, when the taxpayer sells a print, negative, or transparency to a consumer, and does not grant or transfer any copyright, the total charge, including any shooting or other service fee, is subject to the retailing B&O and the retail sales tax.

2. Sale of Rights.

Copyrights are generally considered to be intangible property. General Insurance Co. of America v. Chopot, 28 Wn. App. 383, 386 (1981). Ownership of a copyright is distinct from the ownership of the tangible item. 17 U.S.C. § 202. Transfer of a copy does not transfer the copyright and the transfer of a copyright does not grant a property right in the physical object. Id.

As discussed above, the retail sales tax is generally imposed on the sale of tangible property and services related to tangible

property. Although the income derived from the sale or license of an intangible copyright interest may not be subject to retail sales tax, it is subject to the B&O tax. Under RCW 82.04, a tax is broadly imposed on everyone for the privilege of engaging in business in this state. Business activity for which a specific rate is not specified is taxable under the services and other business activities classification. RCW 82.04.290; WAC 458-20-224. Income derived from a transfer or sale of a copyright or other intangible property interest is subject to the B&O tax for services and other activities. See Det. No. 92-004, 11 WTD 551 (1992) (royalty payments to authors are subject to service B&O tax); Det. No. 92-260, 12 WTD 425 (1992) (income derived from a photographer granting only a license to publish a photograph is subject to the services and other activities tax classification).

In this regard, Rule 140 provides that photographers and photofinishers are:

Taxable under the service and other activities classification upon gross income from sales to publishers of newspapers, magazines and other publications of the right to publish photographs.

Although expressed in terms of a sale to publishers--as commonly occurs with photographers--the same rule would apply to the income derived from the transfer or sale of the right to other persons.

Rule 140 further provides that:

Sales by photographers of the right to publish photographs are primarily licenses to use and not sales of tangible personal property. Such sales are not subject to the retail sales tax.²

As discussed above, income from the sale of an intangible copyright interest is subject to service B&O tax and is not subject to retail sales tax. Rule 140 simply confirms that a

²This statement appears to equate a sale with a license. Under the Copyright Act of 1976, the "transfer of copyright ownership" is defined to include "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or any of the exclusive rights comprised in a copyright..." 17 U.S.C. § 101. Thus the Act allows for the division of ownership interests and largely did away with the distinctions between assignments and licenses. See generally, 3 M. Nimmer, Nimmer on Copyright, § 10.02 (1991).

sale or a license of the right to publish a photograph is not a retail sale.³

Obviously, a printer or publisher must have something to copy. That the printer or publisher may need to use a copy of the photograph does not change the outcome. In general, the use of a print solely for layout and printing--where the photographer retains the ownership of the print or transparency--does not convert what is otherwise a nonretail sale into a retail sale. Such limited use of a tangible item is considered only incidental to the rights being granted. See 17 U.S.C. § 202 (discussed supra).

3. Sale of Prints and Rights.

Although relied on by both the auditor and TI&E, Rule 140 does not address the tax consequences of a sale which includes both prints or transparencies and certain intangible rights.

In the present case, the taxpayer charged a lump sum for the sale of the photographs and certain copyright interests. Although it may be possible to bifurcate the transaction to separate charges for the retail sale from the intangible portions of the sale, the taxpayer does not seek to do that here.⁴ As such, he is required to collect retail sales tax on the entire sum.

In general, the Department "will presume that all charges for photographs to be outright sales of tangible personal property unless the invoice or contract clearly specifies to the contrary." Det. No. 92-260, 12 WTD 425 (1992). In that case,

³WAC 458-20-143 (Rule 143) similarly provides:

So-called "sales" by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and, therefore, are not subject to the retail sales tax.

⁴Bifurcation is not favored; it is only allowed where there is a reasonable basis upon which to bifurcate. See, e.g., Det. No. 89-433A, 11 WTD 313 (1992); Det. No. 90-35A, 9 WTD 289 (1990). When a photo session fee is invoiced and paid separately from an order for prints, retail sales tax does not need to be charged on the fee, only service B&O tax. Det. No. 92-050, 12 WTD 101 (1992). A different result may also occur if the physical object is of nominal value when compared to the value of the intangible interest. See, e.g., Det. No. 90-139A, 10 WTD 327 (1990).

the total charges for the photographs were determined to be a retail sale because it was not clearly stated that only a license to publish was being conveyed. Similarly, in Det. No. 92-141, 12 WTD 369 (1992), the publisher of catalogs which purchased various photographs for publication was determined to have made a retail purchase. In that case, the contract provided for both the purchase of the photographs and the transfer of reproduction rights. Under such circumstances, retail sales tax was owed on the entire purchase price.

However, an exception to this general rule has been allowed for photographs sold to printers or publishers of newspapers, magazines, and periodicals. See ETB 456.08.143 and ETB 417.12.144. In order to treat vendors of photographic services the same as in-house services, such sales are treated as being involved in the intermediate step in the production of a finished product.

Those who purchase such items rather than produce them may supply their vendors with resale certificates and report use tax upon the value of the materials directly to the Department.

ETB 456.08.143.⁵ Accordingly, a photographer selling a photograph with reproduction rights to a printer of newspapers, magazines, and periodicals may take a resale certificate supplied by his vendor and pay wholesale B&O tax on the income from such sales. If no resale certificate is provided, retail sales tax and retail B&O tax would be due.

4. Conclusion.

In general, a commercial photographer should charge retail sales tax on the sale of prints and the sale of prints with certain reproduction rights. Retail sales tax should not be charged on the sale of only reproduction rights. Until modified or withdrawn, Excise Tax Bulletins allow a photographer to take a resale certificate and not charge retail sales tax upon the sale of prints with reproduction rights to a printer or publisher of newspapers, magazines, and periodicals.

In reviewing the various representative invoices, it appears that the taxpayer has properly charged retail sales tax upon the sale of prints with certain reproduction rights, and has charged no sales tax upon the sale of only reproduction rights. It is unclear from the documentation whether the taxpayer took resale certificates from sales to publishers of newspapers, magazines, and periodicals. If he did, he may present proof thereof to the

⁵See also ETB 308.04.224 and ETB 450.04.139.

Audit Division and pay the wholesaling B&O tax rather than the higher service B&O tax on such sales.

DECISION AND DISPOSITION:

The petition is granted. The file is remanded to the Audit Division for amendment as indicated above.

DATED this 28th day of September, 1993.