

L. JOYCE HAMPERS
COMMISSIONER

The Commonwealth of Massachusetts

Department of Revenue

Leverett Saltonstall Building,

100 Cambridge Street, Boston 02204

May 6, 1981

Your client is a self-employed professional illustrator of books, magazines, brochures, party invitations and like items. In most cases she is commissioned by a customer who gives her verbal instructions as to the artwork desired. She is paid for the finished product.

You inquire as to the application of the Massachusetts sales tax in the following situations:

1. Your client sells her work at retail (e.g. she designs party invitations and sells them directly to the consumer.)
2. She sells her illustrations to a publishing company which reproduces the illustrations by photo-mechanical or other processes for incorporation in a book or magazine. She is paid by the publishing company.
3. The same facts as in (2) except that the publishing company takes possession but not title to the original work. In this situation the publishing company will not retain possession of the original work after reproducing it.

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Massachusetts General Laws Chapter 64H, Section 2 imposes a sales tax on sales at retail of tangible personal property. "Sale at retail" is defined in Section 1(13) as a sale of tangible personal property for any purpose other than resale in the regular course of business. A sale includes "[a] transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication." (M.G.L. c. 64H, s. 1(12)(e)).

Section 1(14) of Chapter 64H provides that any amount paid for any services that are a part of the sale must be included in determining the sales price, and that no deduction may be taken on account of the cost of materials used, labor or service cost, or other expenses.

Section 1(13)(c) of Chapter 64H excludes from the definition of "sale at retail" personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made. The Massachusetts Supreme Judicial Court held in Houghton Mifflin Co. v. State Tax Commission that the sale of reproduction proofs to a book publisher was a retail sale and not a personal service transaction exempt from sales tax under Chapter 64H, Section 1(13). The Court stated that

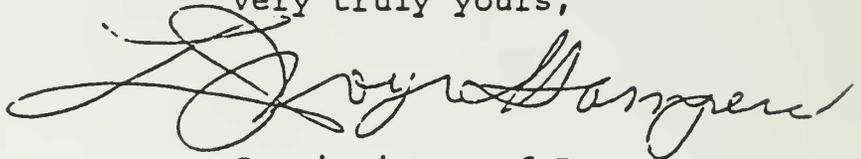
"[t]he cost of labor is often a major cost of producing an object for sale. That circumstance is not the significant factor, however, in determining whether sale is an inconsequential element of a personal service transaction... The test is the object of the transaction. If the buyer's fundamental object is to obtain the item of personal property transferred to it, the sale of that property cannot reasonably be considered 'inconsequential' and the transaction cannot reasonably be considered one for personal service." (373 Mass. 772, 775 (1977).)

Based on the foregoing it is ruled that in each of the situations described above, the sale of artwork by your client

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is a retail sale of tangible personal property within the meaning of Chapter 64B and is subject to the sales tax.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Roy W. Berger". The signature is written in dark ink and is positioned above the printed name of the Commissioner of Revenue.

Commissioner of Revenue

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