



AUGUST 2009

# TAX TOPICS

## SALES AND USE TAX

Texas Comptroller of  
Public Accounts

### Photographers and Texas Sales Tax

Sales of photographs are taxable. Photographs can be made from film (negatives or positive transparencies) or from digital or electronic files, and sold as prints, on a DVD, CD, digitally, electronically or by any other medium.

**All** expenses directly related to the production and sale of photographs and billed to the customer are subject to tax regardless of whether the photographer bills lump sum, at an hourly rate, or by itemizing each expense. Such expenses may include travel, meals and lodging while shooting on location, costs of acquiring props and models and "professional services" in shooting the photograph.

A photographer billing a client for sitting fees must collect sales tax on the entire amount charged for all services performed at the time the pictures are taken (including the sitting fees), whether the billing is lump sum or separated.

If the customer does not purchase photographs, in any form, the photographer can refund sales tax collected on all charges attributed directly to the sitting fee.

See Rule 3.312 for more information.

#### Copyrights

**If** a photographer has retained a copyright in a photograph, sales tax is not due on the sale of a copyright interest in a photograph when:

- the photographer has, in writing, reserved title to the photograph in his name;
- has transferred a copyright interest in the photograph to the customer; and

- the customer is required to either return or destroy their copies of the photograph.

When a photographer sells both the photograph and a copyright interest, a separate charge for the copyright is not subject to sales tax. If a photographer fails to separate the charge for the copyright, however, and the photograph itself is transferred, the entire charge is subject to sales tax.

#### Materials, Supplies and Equipment

**P**hotographers who sell their images are considered manufacturers. Texas Tax Code Section 151.318 exempts materials that become an ingredient or component of the manufactured item, as well as taxable services performed on a manufactured product to make it more marketable. The exemption also applies to materials that make a chemical or physical change in the product being manufactured and that are necessary and essential in the manufacturing process.

A photographer who creates and sells photographs can give an exemption certificate claiming a manufacturing exemption to a vendor when buying the following equipment:

- cameras (film and digital);
- flashes;
- batteries for cameras and flashes;

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OR CALL  
1-800-252-5555.

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- scanners used exclusively to digitize images so they can be edited on computers;
- computers and software used exclusively in editing images;
- image setting and proofing equipment;
- film developing chemicals;
- lights, props and sets; and
- special effects equipment and supplies.

### Divergent Use

Anyone who claims an exemption for an item must pay tax if they use it for personal or nonexempt activities during the month of, or during any month before, the fourth anniversary of the date of purchase. Such use is referred to as divergent use. A manufacturer who uses equipment in a divergent manner in a given month owes no tax on that use if the divergent use percentage in that month is 5 percent or less. The percent of divergent use is measured either in hours (total divergent used hours of operation in the month ÷ total hours of operation during the month) or by output (total output during divergent use in the month ÷ total output during the month). For any month that divergent use exceeds 5 percent, tax is due on the percentage of taxable use in a month times 1/48 of the cost of the property. A photographer who will make both taxable and nontaxable use of an item may elect to simply pay tax on the item at the time of purchase.

Photographers who sell copyrighted pictures are not manufacturing taxable items for sale and thus cannot claim the manufacturing exemption when buying goods and materials used to create those photographs. A photographer who has retained a copyright on a photograph is responsible for paying tax for the supplies and for the divergent use of any equipment purchased under a manufacturing exemption.

See Rule 3.287, sections(e)(1-4), regarding exemption. See Rule 3.300 for additional information regarding manufacturing exemptions.

A taxpayer can take a credit on their return for sales taxes paid in error or taxes that were erroneously accrued and remitted to the

Comptroller's office. An example of sales tax paid in error is if someone mistakenly paid tax when buying exempt manufacturing equipment and was not able to get a refund from the seller. A taxpayer cannot take a credit on a return and also receive a refund from the vendor for the same transaction. Find more information about credits or refunds of sales taxes paid in error here on our Web site at [comptroller.texas.gov/taxes/sales/refunds/](http://comptroller.texas.gov/taxes/sales/refunds/).

### Internet Sales

Orders for photographs placed over the Internet are taxable in the same manner as orders received at a physical location. Sellers are required to collect the Texas sales and use tax due on sales made by Internet or catalog orders if they are engaged in business in Texas as defined in Rule 3.286 and if the photographs will be received by a customer in Texas.

Some companies host Web sites to allow customers to order pictures through the Internet. In these situations, the photographer submits prints to the hosting company to be displayed online where customers can view and order the images. In many cases, the hosting company will process the Internet orders and print and ship the photographs to the customer. The company might receive a fee for each picture ordered, or may retain part of the customers' payments.

In this situation, the photographer, not the hosting company, is responsible for collecting Texas sales tax for photographs sold to Texas residents. Tax is due on the entire charge to a customer in Texas for finished photographs, including any charges for shipping and handling.

However, if the hosting company receives the copyright to pictures sold on its Web site, then the hosting company is considered the seller of the photographs. If the hosting company is engaged in business in Texas as defined by Rule 3.286 section (a) (1) (A - G), then the hosting company, not the photographer, is responsible for collecting the applicable state and local sales and use taxes on all sales shipped into Texas.

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A charge by the Web hosting company to place, store and operate a Web site is subject to Texas use tax as a data processing service. Twenty percent of the charge for data processing services is exempt from Texas tax. See Rule 3.330 for further information regarding data processing services.

### State and Local Sales and Use Taxes

Photographers collect 6.25 percent Texas state tax plus any local taxes from customers on all sales delivered to a customer in Texas.

Local sales and use taxes are collected based first upon the photographer's place of business. If

the photographer is engaged in business in other local taxing jurisdictions, then he may be required to collect local use tax in addition to sales tax, as long as the total amount of local tax collected does not exceed 2 percent.

A seller is engaged in business in a jurisdiction if the seller, or a representative, has had a physical presence/conducted business in the jurisdiction, including delivering products in a personal or company-owned vehicle, within the preceding 12 months.

For more information concerning local taxes, see our publication 94-105 Local Sales and Use Tax Collection-A Guide for Sellers.

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