

# CALIFORNIA COMMERCIAL PHOTOGRAPHERS/ARTISTS SALES TAX

## **Sales Tax and Commercial Photographers/Artists: Main Points of Regulation 1540**



AMERICAN  
PHOTOGRAPHIC  
ARTISTS

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Chair, APA Sales Tax Committee**

August 8, 2007

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## **INTRODUCTION**

This document is an explanation of the basic application of sales tax for photographers in California. It covers many situations, but not all. There are additional nuances and gray areas that have been left out in an effort to get the main points across as simply as possible. We advise you to write to the BOE to get specific advice in situations that are not covered here. The address is provided on page 3 of this document. We have also provided some sample forms and a handy decision tree to help you decide how to apply California sales tax on the last two pages of this document. You will also find more information in the newly revised (July 2007) Publication 68: "Tax Tips for Photographers, Photo Finishers, and Film Processing Laboratories," which can be downloaded from the BOE website at <http://www.boe.ca.gov/pdf/pub68.pdf>.

## **ELECTRONIC DELIVERY IS NOT TAXABLE**

The best way to deal with California sales tax—whenever possible—is to deliver your job electronically.

*Electronic delivery* means providing the final images electronically (by e-mail, FTP, other internet transfer or other electronic transfer including wireless, or a download service) or by the "load and leave" method (see below). When a job is delivered electronically, there is no sales tax due.

Your client cannot receive anything tangible from you (no film, prints, polaroids, contacts, color proofs, CDs, DVDs, hard drives, usb drives, memory cards, etc.) to qualify for electronic delivery. When electronic delivery applies, all invoiced fees, expenses, and/or usage are not subject to sales tax.

If your client receives *anything* tangible from you, then sales tax applies to the entire transaction. Even if your client only keeps the tangible property temporarily and then returns it to you, sales tax applies. There is an exception to this: see the section on Technology Transfer Agreements (TTAs).

Please note that your client *cannot* provide you with any media (hard drive, CD-R, DVD, etc.) for you to load with images. If you do this the entire transaction is taxable. This is the rule. However, you can load the images onto the client's *computer*, but not their *media*. Be clear about this distinction! This is called "Load and Leave."

## **LOAD AND LEAVE IS ALSO CONSIDERED ELECTRONIC DELIVERY**

If you, or a representative of your company, hand carry your electronic media, (CD-R, DVD, hard drive, usb drive, memory card, etc.), in person to your client, attach or insert that media to your client's computer, copy or move the files from your electronic media onto your client's computer, and then remove and take your electronic media back, then sales tax does not apply to the fees and expenses for that job. Your client may not physically take possession of your electronic media. As above, your client cannot receive anything tangible from you. All they receive is the electronic data. This is called "load and leave." You should maintain records documenting each "load and leave." We advise that you ask your client to sign a written confirmation. There is a sample APA Load & Leave form at the end of this document.

There is an exception to this that makes it easier if the transaction is a Technology Transfer Agreement: see the section on TTAs later in this document.

## **BE CREATIVE!**

For example, if you have a job in Los Angeles and you are based in San Francisco you could either fly your assistant to LA to do a load and leave or you could mail the media to an assistant based in LA who could act as your agent and do a load and leave. Feel comfortable charging the client for this because you are saving them money. Obviously, the sales tax savings must be greater than the fee to send the assistant to do the "load and leave" for this to be worthwhile for the client.

### **TECHNOLOGY TRANSFER AGREEMENT: “MAKE AND SELL”**

If you cannot make electronic delivery apply because there is some tangible property the client wants like a proof, there is another option—if it applies: the Technology Transfer Agreement (TTA). If the images *licensed* to the client/buyer are for the purpose of “*making and selling*” a product, with a written agreement (invoice, etc), it is a TTA.

“Making and selling” means that your client will re-sell the images. For example, if you create images for a calendar that will be sold to the public, that is a TTA. If the same calendar were to be given away, it is not a TTA. Be clear on that point. A sale to a magazine is a TTA because the magazine will be resold. In a TTA, sales tax does not apply to the licensing portion of your fee. The other (non-licensing fee) portion relating to tangible property given to the client, say for a color proof or print, is taxable. The non-taxable Licensing Fee must be separately stated on the invoice. The taxable portion, also separately stated, must be “reasonable.” The word “reasonable” is directly from Regulation 1540.

There are 2 other methods for determining the dollar value amount of the taxable portion but this one is the best to use. One of the other methods deals with a lump sum invoice with no separately stated charges, but it is very problematic and best to stay away from. See your CPA or other tax professional for more details on these methods if you feel you want to explore them.

### **COMPUTER DISK DELIVERY OF FINISHED ART WHEN TTA APPLIES**

In a TTA situation, *where there is no tangible property given to the client* like a proof, and the *only* thing you are providing to your client is electronic images on some media, you have the option to mail or otherwise *loan* the media to the client: you don’t have to be there in person to load the images! The media must be returned within about 30 days or so. The 30 days is not a hard and fast rule. Get written documentation of the loan and return of the electronic media. In this situation no sales tax is due on any portion of the job. There is a sample APA TTA Media Loan and Return form at the end of this document.

This really is the same as “load and leave,” where you had to load the images onto the client’s computer from your media in person, except than you can do it by mail or however you want since it is a *loan*.

### **OTHER OPTIONS:**

When electronic delivery or TTA provisions do not apply, there are a few other options that are beyond the scope of this document. Two of them are listed here so you will be aware of them should you need to consider them. One option covers conceptual services and the 75/25 rule that goes with it and the other option relates to preliminary art. The definitions of *conceptual services* and *preliminary art* are not clear cut and can be problematic. However, if you want to explore those options, know that conceptual services and preliminary art are non-taxable when they apply, and knowing when they apply can be difficult since Regulation 1540 itself is not quite clear on it. Again, see your CPA or other tax professional for more details on these options if you feel you want to explore them.

Remember that electronic delivery, when possible, is your best option: it is completely sales tax free and trumps all other methods and situations.

### **RESALE**

If your client provides you with a signed resale certificate, you do not need to apply tax to your transaction with that client. However, if you know or have reason to believe that your client will not re-sell the images, you cannot accept the resale certificate and must collect the sales tax. Many ad agencies are not acting as resellers to their clients but as agents, and as agents they cannot issue you a resale certificate to avoid paying sales tax.



### OUT OF STATE DELIVERY

If you deliver photographs to an out-of-state location, no sales tax applies to the transaction. Note that if you deliver photographs to an out-of-state client while they are physically in the state of California, then sales tax applies to the transaction. You should document all out of state deliveries.

### WHAT IF A CLIENT REFUSES TO PAY SALES TAX

If you believe that sales tax applies to a transaction, and if your client refuses to pay sales tax listed on your invoice, you should refer the client to Regulation 1540, and suggest that the client obtain a determination letter from the BOE addressing the specific circumstances of the transaction and indicating that sales tax does not apply. Once you receive a copy of that letter from your client, you can re-issue an invoice without sales tax. You are ultimately responsible for collecting sales tax on your transactions, and should not allow your clients or any other company to make determinations as to whether or not sales tax applies to your transactions.

### SALES TAX STRATEGIES

It is a good idea to discuss sales tax with your client at the estimating stage of a job. If your client is budget conscious, you can suggest to the client that electronic delivery will avoid sales tax, but you should also advise the client in advance that this will prevent you from supplying anything tangible to them, including color proofs, printouts, CDs, DVDs, etc., and that all files will need to be either FTP'd or downloaded. If the client is local to you, you might suggest "Load and Leave" as a means of avoiding long download times for numerous large files. If the client intends to provide a resale certificate, you should determine this at the estimating stage. If the transaction might qualify as a TTA, then this should be discussed in advance as well. By discussing sales tax in advance you will avoid misunderstandings with your clients that can result in sales tax errors or delays in invoice payment.

### MORE INFORMATION

For more information see Regulation 1540 which can be downloaded from the BOE website.

For the most safety and assurance, particularly in gray areas and areas not covered here, it is best to write to the BOE and get a determination letter from them. If you get such a letter from them, it is protection from any penalties as long as you follow the advice in the letter. As far as the BOE is concerned, the preferred method of handling tax questions is to send a letter *with the problem fully described* to Jeff McGuire, Chief of the Tax Policy Division. His address is:

State Board of Equalization  
ATTN: Jeffrey L. McGuire, MIC 92  
P.O. Box 942879  
Sacramento, CA 94279-0092

### APA SAMPLE FORMS

1. APA Load & Leave form (top of next page)
2. APA TTA Media Loan and Return form (bottom of next page)

INVOICE #

[PHOTOGRAPHER]

CALIFORNIA STATE SALES TAX [Reg 1540 sec (b)(2 )(B)]  
**NON-TAXABLE TRANSFER OF ELECTRONIC ARTWORK**

This electronic artwork was loaded onto the computer of Client:

by [PHOTOGRAPHER] or [PHOTOGRAPHER] representative, and [PHOTOGRAPHER] or [PHOTOGRAPHER] representative did not transfer any tangible personal property containing the artwork, such as electronic media or hard copies, to the above named client.

[PHOTOGRAPHER]

SIGNATURE

DATE

PRINT NAME LEGIBLY

TITLE

CUT HERE

INVOICE #

[PHOTOGRAPHER]

CALIFORNIA STATE SALES TAX [Reg 1540 sec (b)(2)(D)(2)]  
**NON-TAXABLE Temporary transfer of computer storage media containing finished art transferred as part of a Technology Transfer Agreement.**

Computer storage media containing electronic artwork was loaned to Client:

by [PHOTOGRAPHER] on \_\_\_\_\_(date)

and returned to [PHOTOGRAPHER] on \_\_\_\_\_(date)

[PHOTOGRAPHER]

CLIENT

DATE

PRINT NAME LEGIBLY

# SIMPLIFIED COLLECTION OF CALIFORNIA SALES TAX FOR PHOTOGRAPHERS

Decision Tree prepared by APA member Paul Antico, Chair, Sales Tax Committee, August 8, 2007



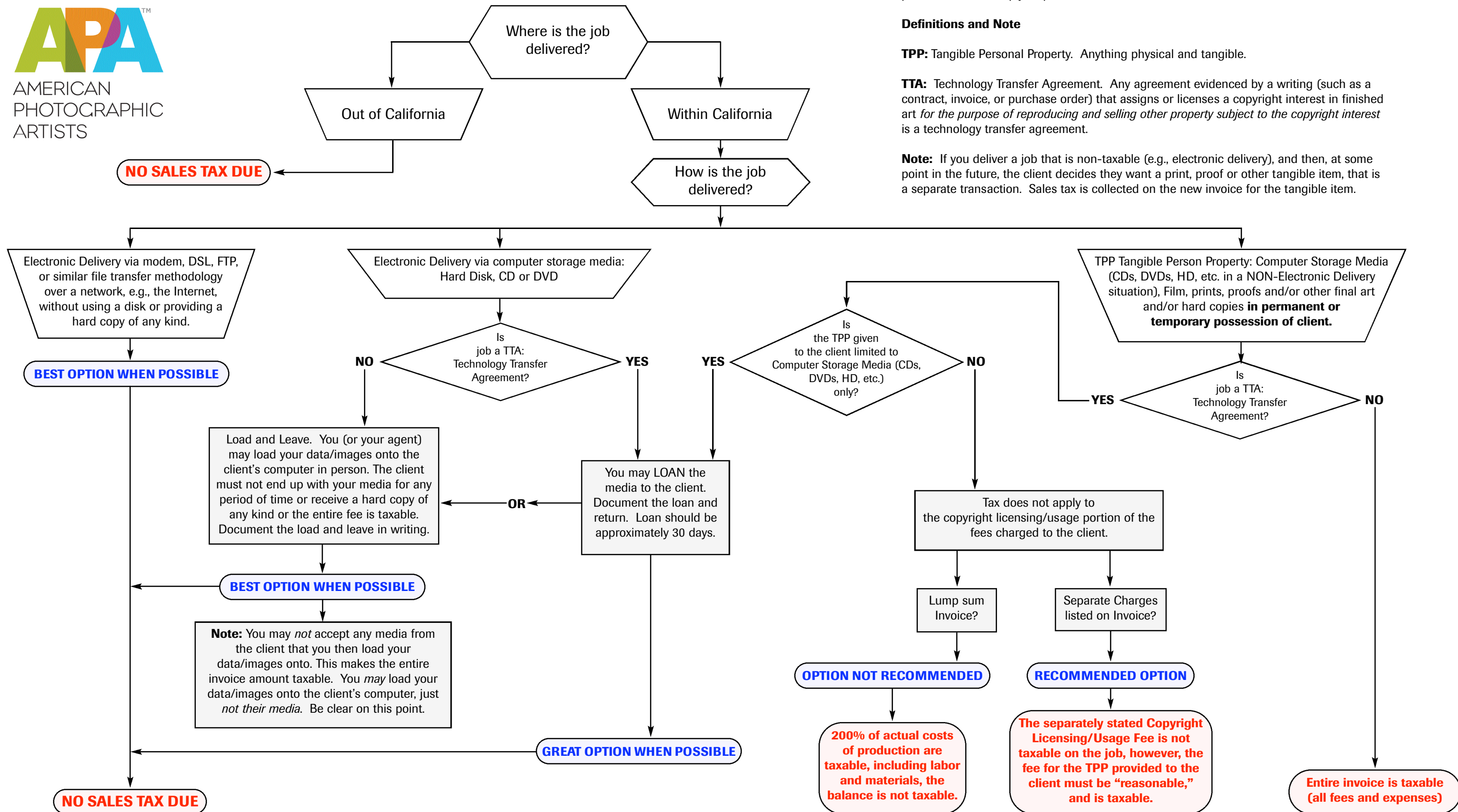
This decision tree is an explanation of the basic application of sales tax for photographers in California from BOE Regulation 1540. It covers many situations, but not all. There are additional nuances and gray areas that have been left out in an effort to get the main points across as simply as possible.

## Definitions and Note

**TPP:** Tangible Personal Property. Anything physical and tangible.

**TTA:** Technology Transfer Agreement. Any agreement evidenced by a writing (such as a contract, invoice, or purchase order) that assigns or licenses a copyright interest in finished art for the purpose of reproducing and selling other property subject to the copyright interest is a technology transfer agreement.

**Note:** If you deliver a job that is non-taxable (e.g., electronic delivery), and then, at some point in the future, the client decides they want a print, proof or other tangible item, that is a separate transaction. Sales tax is collected on the new invoice for the tangible item.



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