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## Directive 11-4: Application of Sales/ Use Tax to Charges of Professional Photographers

**I. Introduction:** This directive clarifies which charges of professional photographers to their Massachusetts customers are subject to sales tax. The Massachusetts sales tax applies to any sale at retail in the Commonwealth, by any vendor, of tangible personal property or telecommunication services at the rate of 6.25 per cent of the gross receipts of the vendor of all such sales. G.L. c. 64H, §§ 1, 2. The Appellate Tax Board has previously ruled that under certain circumstances a portrait photographer's separately stated charges for "sitting fees" constitute distinct service transactions and, as such, are not subject to the sales tax. See, *Miller Studios v. Commissioner of Revenue*, A.T.B. Docket No. 157022 (March 27, 1992). However, other separately stated charges and charges of professional photographers hired for an event such as a wedding and selling a package of services and tangible personal property were not specifically addressed in the *Miller Studios* decision.

**II. Issue:** Under what circumstances may a professional photographer's separately stated charges for his or her services be exempt from Massachusetts sales tax?

**III. Directive:** Charges of a professional photographer are generally subject to Massachusetts sales tax where the final product is delivered to the purchaser in a tangible medium, regardless of whether those service charges are separately stated from the charge for the tangible item. [\[1\]](#) Separately stated charges for services, such as "sitting fees", provided to a customer who is obligated to pay for those services but not obligated to purchase any tangible personal property as part of the transaction will not be subject to Massachusetts sales tax.

**IV. Discussion:** The Massachusetts sales tax is an excise on sales at retail of tangible personal property. Any amount paid for any services that are a part of a sale of tangible personal property must be included in determining the sales price of the property on which the tax is based, and no deduction may be taken on account of the cost of materials used, labor or service cost, or other expenses. G.L. c. 64H, § 1.

The term retail sale is defined to exclude "professional, insurance, or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made." G.L. c. 64H, § 1. The Massachusetts Supreme Judicial Court (SJC) set out the standard for determining whether or not a transaction is a service transaction in *Houghton Mifflin Co. v. State Tax Commission*, 373 Mass. 772 (1977). There, the SJC stated that "[w]hether a particular transaction involving the transfer of property is a personal service transaction depends on the facts... Where the services and the property are inseparable, because of the integrated nature of the transaction, the character of the transaction must be analyzed to ascertain whether the buyer's basic purpose was to acquire the property which was sold to it or to obtain the services." *Id.*, 373 Mass. at 774.

In most instances, the purpose of hiring a professional photographer is to acquire tangible personal

property, *i.e.*, photographs or a video. Therefore, except as noted below, all charges of a professional portrait or wedding photographer will be subject to Massachusetts sales tax where the final product is delivered to the purchaser in a tangible medium such as a wedding album, CD, DVD, finished portrait, etc. A photographer's transfers of pictures solely in a digital file via the Internet would not be subject to Massachusetts sales tax because it would not involve a transfer of tangible personal property as contemplated by G.L. c. 64H, § 1. Likewise, separately stated charges for services such as "sitting fees" provided to a customer who is obligated to pay the "sitting fee" or other service charge but not obligated to purchase any tangible personal property as part of the transaction will not be subject to Massachusetts sales tax.

## V. Examples:

For purposes of the following examples the pricing reflects arm's length rates for both services and items of tangible personal property.

Example 1: A wedding photographer charges \$3500 for services to photograph a client's wedding day. The photographer also charges a fee of \$500 for a DVD of the images captured that day. The client is obligated to purchase the DVD under the terms of the contract with the photographer and the client has the option of purchasing additional copies of the DVD or prints. The invoice to the customer separately states the charges for the wedding photography services and the DVD of wedding images. The total amount of \$4000 is subject to Massachusetts sales tax.

Example 2: A wedding photographer charges \$3500 for services to photograph a client's wedding day. The photographer also gives the client the option of acquiring the images taken at the wedding via digital download from the photographer's File Transfer Protocol ("FTP") site or a DVD of the images captured that day for a fee of \$500. [2] The customer opts to receive the images via digital download. Since there has been no transfer of tangible personal property, the entire transaction would not be subject to Massachusetts sales tax.

Example 3: A wedding photographer charges \$4000 for a package that includes photography services for the wedding, and also a DVD of the images taken that day provided to client on a disc. The invoice to the customer does not separately state the charges for the wedding photography services and the DVD of wedding images. The total amount of \$4000 is subject to Massachusetts sales tax.

Example 4: A wedding photographer charges \$4000 for a package that includes photography services for the wedding, and also the images taken provided to client via digital download from the photographer's FTP site. Additionally, there is a separately stated charge on the invoice for a \$1000 Wedding Album, which the customer is required to purchase under the terms of his contract with the photographer. Since this transaction entails a transfer and purchase of tangible personal property, the total amount of \$5000 is subject to Massachusetts sales tax.

Example 5: A portrait photographer charges a \$200 sitting fee for a photography session of up to 1 hour, and \$300 for the DVD of 40 images taken during that session. The customer is not obligated to purchase the DVD or any other tangible personal property, but elects to buy the DVD. The invoice to the customer separately states the charges for the sitting fee and the DVD. Sales tax is due on the \$300 for the DVD, with the \$200 paid for the sitting fee not subject to tax under the *Miller Studios* decision.

Example 6: A portrait photographer charges a \$500 fee which includes a sitting fee for a photography session of up to 1 hour, along with a DVD of 40 images taken during that session. The invoice to the customer does not separately state the charges for the sitting fee and the DVD. Since there is no separately stated charge for a sitting fee, the total amount of \$500 is subject to Massachusetts sales tax.

Example 7: A portrait photographer charges a \$500 fee which includes a sitting fee for a photography session of up to 1 hour, along with a DVD of 40 images taken during that session. The customer is obligated to purchase the DVD. Since the customer is obligated to purchase an item of tangible personal property, the total amount of \$500 is subject to Massachusetts sales tax regardless of

whether the sitting fee is separately stated.<sup>[3]</sup>

Example 8: A portrait photographer charges a \$500 fee which includes a sitting fee for a photography session of up to 1 hour, as well as 40 of the images provided to the client via digital download from the photographer's FTP site. Since there has been no transfer of tangible personal property, the transaction would not be subject to Massachusetts sales tax.

Example 9: A portrait photographer charges a \$200 sitting fee for the photography session of up to 1 hour, \$300 for the DVD of 40 images taken during that session and \$500 for an album of the photos taken that day. The customer is obligated to pay the sitting fee, but not obligated to purchase any tangible personal property under the terms of the agreement with the photographer, but elects to do so. The invoice to the customer separately states each of the charges. Sales tax is due on the \$300 for the DVD and the \$500 for the photo album, with the \$200 paid for the sitting fee not subject to tax under the *Miller Studios* decision.

Example 10: A portrait photographer charges a \$500 sitting fee which includes a photography session of up to 1 hour, as well as 40 of the images provided to client via digital download from the photographer's FTP site. Additionally, there is a separately stated charge on the invoice for a \$500 photo album. The customer is obligated to pay the sitting fee, but not obligated to purchase any tangible personal property under the terms of the agreement with the photographer, but elects to do so. Sales tax would apply to only the \$500 album in this transaction with the \$500 paid for sitting fee and digital download not subject to tax under the *Miller Studios* decision.

To the extent that the provisions of any prior public written statements issued by the Department, including but not limited to, Letter Rulings 81-73, 82-42, 83-20, 84-79, 85-13 and DOR Directive 86-15, are inconsistent with the provisions of this Directive, they are superseded.

/s/Navjeet K. Bal

Navjeet K. Bal  
Commissioner of Revenue

NKB:MTF:ds

August 9, 2011

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<sup>[1]</sup> Note that if the final tangible product is delivered to a purchaser outside the Commonwealth or to an interstate carrier for delivery to a purchaser outside the Commonwealth, the sale may be exempt from the Massachusetts sales tax. See G.L. c. 64H, s. 6(b).

<sup>[2]</sup> File Transfer Protocol (FTP) refers to the process of sending or receiving photo files over a network supported by a transmission control protocol, such as the internet. If the receiver of the file has an FTP server, he can not only download photo files, but also manipulate them in a variety of ways. This and other methods of electronic transfer of images do not involve a transfer of tangible personal property.

<sup>[3]</sup> This fact pattern is distinguishable from the facts in *Miller Studios* in that the charges for sittings there were optional and not considered deposits toward the purchase of photographs. Rather, they were "distinct charges payable irrespective of finished portraits being ordered."