

**STATE BOARD OF EQUALIZATION**

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September 21, 1990

Ms. B--- R---
K--- P---, Inc.
P.O. Box XXX
---, -- XXXXXX

Dear Ms. R---:

This is in response to your letter dated September 11, 1990 regarding the application of sales and use tax to accessing of databases. You set forth four hypotheticals, each of which is quoted below followed by our analysis.

“Hypothetical 1: A resident of your state uses his or her computer and calls an on-line date service (e.g. Westlaw or BNA On-Line). The individual searches the database, reviews the results on the screen and takes hand written notes. Assuming the database provider charges for the search, is any sales or use tax due?”

California sales tax is imposed upon a retailer’s retail sale of tangible personal property in California. (Rev. & Tax. Code § 6051.) Alternatively, use tax is imposed upon the use of tangible personal property purchased from a retailer for use in California. (Rev. & Tax Code §§ 6201, 6204.) For purposes of the California Sales and Use Tax Law, “sale” and “purchase” include the transfer of title or possession of tangible personal property for a consideration. (Rev. & Tax. Code §§ 6006(a), 6010(a).) Those terms also include the fabrication of tangible personal property for a consideration of consumers who furnish either directly or indirectly the property used in the fabrication. (Rev. & Tax. Code §§ 6006(b), 6010(b).)

In this hypothetical, the database operator provides electrical signals which contain the information sought by the user. No tangible personal property is transferred to the user and the database operator performs no fabrication of tangible personal property supplied by the user. Therefore, no sale of tangible personal property occurs and no sales or use tax applies.

“Hypothetical: The access and search is identical to Hypothetical 1 except that the results are downloaded into the individual’s local terminal and either printed out on the individual’s printer or saved to a diskette. Is any sales or use tax due?”

The analysis above applies equally to this hypothetical. The database operator transfers on tangible personal property to the user. The operator also does not fabricate any tangible personal property provided by the user (the user performs the fabrication, if any). No sale occurs and no sales or use tax applies.

“Hypothetical 3: The access and search is identical to Hypothesis 1 except that the compiled information is printed out by the database operator and mailed to the individual. Is any sales or use tax due? Does it matter if the database provider resides in or out of state?”

We look to the true object of a contract to determine whether it is a contract for the providing of a service or for the sale of tangible personal property. (Reg. 1501.) When the true object of a contract is the providing of a service, the service provider is regarded as the consumer of any tangible personal property furnished in providing that service. Where a database operator provides information in response to the unique request for information from the user, we consider the operator to be providing a service. (The analysis provided above in response to hypotheticals 1 and 2 is to give you a general understanding of California Sales and Use Tax Law.) Therefore, sales or use tax does not apply to the transfer since the operator is regarded as the consumer of that property. If the operator consumes the property in California (for example, transfers title to the user in California by depositing it in the mail in California), then use tax applies to the operator’s use of that property measured by the operator’s cost of the property (unless the operator had already paid sales tax reimbursement to its vendor when purchasing that property).

“Hypothetical 4: Does the taxability of these transactions change if the state resident dials (1) an 800 number, (2) an out of state number, or (3) an in state telephone number?”

Since these transactions are not sales, this hypothetical is not relevant. However, we note that this factor would not alter whether a transaction is subject to tax or not. Rather, if this factor existed with respect to a taxable sale, it may cause the retailer to be regarded as a retailer engaged in business in this state required to collect use tax and remit it to this state. (See Rev. & Tax. Code § 6203.)

Regulation 1502 relates to computers, programs, and data processing and may be of interest to you. A Copy of that regulation is enclosed. You note that you are compiling a national survey on this subject and you ask if we would like a copy of the final report. We would. Finally,

we note that the information provided herein is informational only. In order for this Board to have the discretion to relieve a person from certain tax liabilities when that person has relied on an incorrect opinion from the Board, that opinion must be a written opinion in response to a written request for opinion for a specifically identified taxpayer.

If you have further questions, feel free to write again.

Sincerely,

David L. Levine
Senior Tax Counsel

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Enclosure