

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
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(916) 445-5550

October 16, 1991

Mr. S--- B---
D--- T--- N--- Corporation
XXXX West --- Road, Suite XXX
---, Nebraska XXXXX

Re: D--- T--- N--- Corporation

Dear Mr. B---:

This is in response to your letter dated September 2, 1991, and received by us September 10, 1991. You ask how tax applies to the business of D--- T--- N--- Corporation (DTN).

DTN provides each of its subscribers data receiving equipment and provides information to those subscribers by satellite transmissions received by the equipment provided to the subscribers. The receiver converts the data stream into video-text which can be read on a monitor. Although the subscriber can print out that text, the receiver is not a computer and has no keyboard or data storage capabilities. DTN retains ownership of the receiving equipment and upon cancellation of the subscription, that equipment is returned to DTN.

DNT's basic information package requires the subscriber to pay a one-time start-up fee (initiation fee) and a monthly subscription fee. Subscribers can also sign up for additional services (similar to the addition of a premium channel to a basic cable television subscription). These additional services are provided by a third party and transmitted through DTN to the subscriber. The subscriber would pay an additional monthly fee for this service. The other information provided to subscribers relates to a third party paying DTN to transmit information from these third parties to DTN's subscribers. The third party may designate certain of DTN's subscribers to receive the same message and would pay a fixed monthly fee to DTN for transmitting this electronic mail. The third party may also contract with DTN to send messages which are different for each subscriber who the third party selects to receive it. The fee paid by the third party for these transmissions would be based on the number and length of these messages.

You ask whether any sale, telecommunications, excise, consumption, or other type of tax applies to your business. Of the taxes administered by this agency, only sales and use tax is relevant to your business. The Sales and Use Tax Law imposes sales tax on the retail sale of tangible personal property in California or use tax on the purchase of property for use in California. Sales or

use tax applies to the charge for services only when those services are required as part of the sale of tangible personal property (fabrication labor). (Rev. & Tax. Code §§ 6006(b), 6012, 6051, 6201.)

Your subscriptions consist of two basic components: the providing of the data receiving equipment and the providing of electronic satellite transmissions. The electronic satellite transmission component does not involve the transfer of tangible personal property and, under the facts you have provided us, we do not regard these services as part of the sale of tangible personal property. Therefore, the amount of the charge attributable to these services is not subject to sales or use tax. I note that one of your questions is, if there is a tax upon the services, is the tax based upon the tax laws of the state from which the information is sent or the tax laws of the state where the information is received. No California tax administered by this agency applies to the charge for these services regardless of where they originate or terminate. Whether other states impose tax on charges when the transmission originates or terminates in their states is determined under the laws of those states.

The other component of your business is the providing of the data receiving equipment. If you were not regarded as leasing this equipment to your customers, then you would be regarded as the consumer of such equipment and use tax would apply to your use of that property in California measured by your purchase price of the property. If you are regarded as leasing the property to your customers, the leases would be continuing sales and purchases unless: 1) the equipment is leased to the lessees in substantially the same form as acquired by you; and 2) you have made a timely election to pay California sales tax reimbursement or use tax measured by purchase price of the property. (Rev. & Tax. Code §§ 6006(g), 6010(e), Reg. 1660, a copy of which is enclosed.) If the leases are regarded as continuing sales, the lessees owe use tax measured by rentals payable which you must collect and pay to the state. (Rev. & Tax. Code §§ 6201, 6203.)

There are thus three possibilities: 1) you are not regarded as leasing the equipment to your customers and tax applies to your purchase price of that equipment; 2) you are regarded as leasing the equipment in substantially the same form as acquired and make a timely election to pay tax on purchase price (end result being the same as the first possibility); or 3) you are regarded as leasing the equipment to your customer and either fail to make a timely election to pay tax on purchase price or are not leasing it in the same form as acquired (e.g., you are the manufacturer). Under the third possibility, tax is due measured by the rentals payable under the lease.

Although one of your brochures indicates that you are not leasing the equipment to your customers, your method of billing seems to indicate otherwise. The amount of the initiation fees is dependent upon which equipment is provided to the customer. The monthly subscription fees also vary, apparently also dependent upon which equipment is provided to the customer. Finally, the agreement requires that the customer insure the equipment provided by DTN.

In summary, if you provide the equipment to your customers in substantially the same form as acquired by you and you make a timely payment of use tax measured by purchase price, no further California use tax would be due with respect to that equipment whether you are regarded as leasing it or not. However, if you do not provide the equipment in substantially the same form as

acquired by you or you do not make a timely election to pay use tax measured by purchase price, then we must ascertain whether you are leasing it to your customers. If so, tax would be due measured by the rentals payable attributable to those leases. If not a lease, use tax would be due on your purchase price of the equipment or component parts thereof.

Based upon the information you have provided us, it appears that you are leasing the equipment to your customers. Please note, however, that if you are providing the equipment to your customers in substantially the same form as acquired, this means that you may elect to pay tax on purchase price or on rentals payable. If you disagree that you are leasing the equipment, feel free to write us again with further information which addresses our observations with regard to your contract and with information regarding the form in which you acquire the subject equipment.

Sincerely,

David H. Levine
Senior Tax Counsel

DHL:cj
Enclosure