

**STATE BOARD OF EQUALIZATION**

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March 30, 1989

Mr. W. W--- Z---
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Mailing lists on computer tape and management reports

Dear Mr. Z---:

In your January 11, 1989 letter to Mr. Les Sorensen, Senior Tax Counsel, you write:

“We have a client who is in the business of furnishing mailing lists, mailing labels, and various marketing reports. We solicit your opinion as to the proper application of California sales (and seller’s use tax) on the various segments of our client’s business. We will refer to our client as ABC.

“ABC is not presently registered in California, but desires to understand proper application of California tax to its business in the event that it is required to register in California and in the future. Most of ABC’s mailing list business is through brokers.

“First of all, ABC has read Regulation 1504, and believes that 1504(a)(4) means that only the charge specified for the tape itself is subject to tax in California, and not separately stated charges for the content of the tape.

“ABC understands that sales of mailing labels for one-time use are not subject to tax.

“The area of most concern is ABC’s report business. There are several types of reports which ABC furnishes. Except as otherwise noted, ALL THE REPORTS FURNISHED BY ABC ARE PRINTED, AND ARE PREPARED FOR THE INDIVIDUAL CLIENT ONLY.

“ABC has certain manufacturer clients who include a market survey card in the package with their product. ABC receives the cards which are completed by the consumer, and keys the information from the cards into ABC’s database. The manufacturer clients pay an annual subscription fee to obtain demographic information about the consumers who complete and return the survey cards. Some of these reports are printed, and some are down loaded onto floppy discs for use on personal computers.

“In the instances where the reports are printed, we believe that the true nature of the transaction is the information, not the media on which it is printed, and consequently the charge for such a report would be non-taxable.

“In the instances when the information from ABC client’s customers [is] down loaded on floppy discs, the discs also contain specific information from ABC’s data base. ABC’s client can manipulate the information on the disc to meets its specific needs. We believe that, even if your opinion is that these reports constitute software, it is surely custom software, as ABC client’s information on its customers is proprietary, and no two report discs are alike.”

You describe in your letter several of the types of reports which ABC provides to its clients. One report tells a manufacturer how many units of a particular model have been sold, and how many units are still on the retailer’s shelf. You describe a report called the Customer Profile Analysis as follows:

“ABC takes a client furnished customer database, such as a magazine subscription list for a publisher, and compares the names against ABC’s database for matches. A report is generated which provides additional information about the matches. This report may be all that ABC’s client wants, or may result in the client requesting a mailing list containing names of persons who closely match the existing subscription list of the publisher.”

Another report is a Response Profile Analysis. For this report, the client furnishes its list to ABC to use in performing a search for matches with ABC’s data base, and ABC furnishes a report to the client containing information on ABC’s data base on the matches. Another report offered by ABC is called a FOCUS report. You write:

“For instance, while a Profile Analysis report may group by age, sex, geographic location, and/or marital status, a FOCUS report will include information in income levels, type of employment, education, purchasing habits, etc.”

Opinion

As a preliminary matter, we note that the California use tax is not a seller's use tax, but rather is a tax on the storage, use, or consumption of tangible property in California by any person, whether that person is an individual or a business, and whether or not the business is required to hold a seller's permit. (Revenue and Taxation Code Sections 6201, 6202). If the person who purchases the tangible property is liable for the use tax because of his storage, use, or other consumption of the property in California, a retailer engaged in business in California who makes the sale to the purchaser is responsible for collecting the use tax from the purchaser and paying it to the Board. (Revenue and Taxation Code Sections 6202, 6203). ABC is a retailer engaged in business in California regardless of the fact that it is located outside of California, if it sells mailing lists or other property which is subject to tax, to California purchasers, and if it meets any of the definitions of a retailer engaged in business in California set out in Section 6203. For instance, if ABC has brokers operating in this state under its direction and control for the purpose of selling taxable mailing lists, then it would be a retailer engaged in business under Section 6203(b).

Also, since you have not identified the taxpayer in your letter, this letter does not constitute specific written advice to the taxpayer within the meaning of Revenue and Taxation Code Section 6596 (relief from tax based on written advice). Instead, this letter constitutes general advice to you regarding the issues discussed.

With respect to mailing lists on magnetic tape or other computer-readable storage media, we disagree that tax applies only to the separately-stated charges for the tape itself, and not to the electronically encoded content of the tape. Regulation 1504(a)(4) states:

“(4) MAGNETIC TAPES. Where the names and addresses are recorded on magnetic tapes or similar devices used to produce written or printed names and addresses by electronic or mechanical means, charges for the transfer or use of the tape or similar device are subject to tax to the same extent as receipts from sales or rentals of tangible personal property generally regardless of any contractual restrictions on the frequency of use. (Effective July 1, 1972.)”

Where there is a sale or lease of tangible property which is subject to tax, the measure of the tax is the entire amount of the consideration received for the sale or lease. (Revenue and Taxation Code Sections 6011, 6012). This provision of Regulation 1504 subjects to the sales or use tax the entire charge which ABC makes to its customers for their use of the mailing list on the magnetic tape.

We agree with ABC's understanding that sales of mailing labels for one-time use are not subject to tax. Regulation 1504(a)(1) defines a mailing list as including gummed labels. Regulation 1504(a)(3) provides as follows:

“LIMITED USE. Tax does not apply to charges for the transfer or use of mailing lists, where a contract restricts the transferee or user to use of the mailing list one time only. The charges in such cases are considered to be for information or addressing services.”

With respect to ABC's reports, we agree with your contention that tax does not apply to these reports (except charges for additional copies) whether the reports are transmitted to its clients on paper or on floppy disks for use on personal computers. If ABC generates the reports entirely from data provided by the client, the reports constitute the nontaxable service of processing customer furnished information, within the meaning of Regulation 1502(d)(5). If ABC uses information contained in its own data base as well as customer-provided information in order to generate the report, then we agree with your contention that under the true object of the contract test set out in Regulation 1501, ABC is providing a nontaxable service in transferring the report, and the tangible property (either paper or disks) on which the report is transmitted is consumed by ABC and not sold by ABC.

However, the reports on floppy disks do not constitute software (custom or otherwise) but rather merely data or information files. Applications programs generate computer-readable instructions so that the data or information files on the disks can be manipulated. The provisions of Regulation 1502(f) which relate to custom computer programs do not apply to ABC's reports.

I enclose copies of Regulations 1501, 1502, and 1504 for your information. Please feel free to contact me if you have any further questions or comments about this matter.

Sincerely,

John Abbott
Tax Counsel

JA:jb
Enclosures