

**STATE BOARD OF EQUALIZATION**

(916) 324-8208

April 3, 1991

Mr. L--- R--- L---
P--- N---
P. O. Box XXXX
---, California XXXXX

Re: Application of Sales Tax to Diet Analysis
SR -- XX-XXXXXX

Dear Mr. L---:

Your letter dated February 14, 1991, requesting advise on the application of sales tax to the diet analysis reports which will be offered by your business has been forwarded to me for a response. In your letter you state as follows:

“We are planning to offer a personal diet analysis service through the mail. To take advantage of this service, a person will fill out a diet questionnaire, supplied by us, and send it back in along with the appropriate amount of money. We take the information provided, enter it into a computer, analyze the nutrient content of the persons’ diet, and print out a report of several pages that summarizes and explains the results. The report is bound and sent back to the customer. As part of the service, the customer also gets to choose a certain number of informational pamphlets on nutrition subjects free of charge. If the customer wants to receive more pamphlets than the number of agreed ones allowed, he or she must pay an additional amount for them. Finally, we intend to charge a postage and handling fee of about \$2.00.”

You further state that you buy the pamphlets retail from the American Dietetic Association based in Chicago, Illinois.

You have requested our advice on the following issues:

1. Does sales tax apply to the charges for the diet analysis?
2. Are the free pamphlets and additional pamphlets subject to sales tax?
3. Does sales tax apply to the additional pamphlets which are ordered by a customer outside of California if you ship them directly to the out-of-state customer?
4. For California customers, is the postage and handling fee subject to sales tax?

A. Sales Tax Generally

Revenue and Taxation Code section 6051 imposes a sales tax upon retailers measured by the gross receipts from retail sales made in this state of tangible personal property. Although the sales tax is imposed upon the retailer, the retailer may collect sales tax reimbursement (usually itemized on the invoice as "sales tax") from the purchaser if the contract of sale so provides. Civ. Code §1656.1. All gross receipts from retail sales are presumed subject to tax until the contrary is established. Rev. & Tax. Code § 6091.

B. Diet Analysis Reports

There must be a sale before a transaction is subject to sales tax. A sale means and includes any transfer of title or possession, in any manner or by any means whatsoever, of tangible personal property for a consideration. Rev. & Tax. Code § 6006(a). A sale also includes a transfer for a consideration of the title or possession of tangible personal property which has been produced or printed to the special order of the customer. Rev. & Tax. Code § 6006(f).

With respect to the diet analysis reports which you offer to the public, the critical issue is whether you are making sales or providing services. You believe that you are providing a service and that Sales and Use Tax Regulation 1502(d) is applicable.

Regulation 1502(d) explains when manipulation of customer-furnished information is a sale or is a service. Where a data processing firm enters into a contract for the processing of customer-furnished information, the transfer of the original information to the customer is considered to be the rendition of a service and is generally not subject to sales tax. Regulation 1502(d)(1) and 1502(d)(5)(C). "Processing of customer-furnished information" means developing of original information from data furnished by the customer. Examples of automatic data processing processes which result in original information are summarizing, computing, extracting, sorting, and sequencing. Regulation 1502(d)(5)(A).

It appears from your letter that when you run a computer program to prepare a diet analysis report, the program is not just processing information given by the customer. Rather, we assume that the program is giving additional information and advice to your customers based upon the data supplied by them. Therefore, these activities do not fall within the provisions of Regulation 1502(d).

It does appear, however, that your diet analysis reports should be classified as a service. Sales and Use Tax Regulation 1501, entitled "Service Enterprises Generally," sets forth the general criteria for distinguishing a sale from a service. It provides, in pertinent part, as follows:

"The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred...."

"When a transaction is regarded as a sale of tangible personal property, tax applies to the gross receipts from the furnishing thereof, without any deduction on account of the work, labor, skill, thought, time spent, or other expense of producing the property."

As long as a diet analysis report is not a "canned" report but rather represents specific analysis performed by a computer program upon the information a customer submits, it is our opinion that your charge for the diet analysis report is a charge for a service and not for tangible personal property. Thus, that portion of the charge which is for the work and services that go into producing the report and for the paper and ink upon which the report is printed is not subject to tax. Note, however, that you are the consumer of the paper and ink upon which the reports are written and your purchases of such items are taxable.

C. Pamphlets

We do not agree that the informational pamphlets which you provide with the reports are free. You do not offer such pamphlets free of charge to a person who does not contract for your nutritional information services, and you intend to charge your customers for additional pamphlets. Therefore, we consider part of the amount you charge a customer for the diet analysis service as a charge for the pamphlets. This is a taxable sale of tangible personal property, and you should measure the tax by the amount you would charge a customer who was ordering the pamphlets as additional pamphlets. We agree with you that the additional pamphlets are subject to sales tax. Given our conclusion that you are making retail sales of the pamphlets, you may buy all of your pamphlets from the American Dietetic Association for resale.

D. Out-of-State Shipments

Gross receipts from pamphlets sold to customers outside of California are not taxed if the interstate sales exemption set forth in Revenue and Taxation Code section 6396 applies. A retail sale is eligible for this exemption if all of the following requirements are met:

1. There must be a contract of sale which requires that the tangible personal property be shipped to a point outside the state, and such property must, in fact, be shipped outside the state. The contract of sale may be oral or written.
2. The tangible personal property may not be delivered to the purchaser in California before being shipped outside the state.
3. The tangible personal property must be shipped by the retailer by facilities operated by him or by delivery by the retailer to a carrier, customs broker, or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point. Shipments by the U.S. postal service meet this requirement.

Those sales of pamphlets to out-of-state customers which meet all of the above requirements are exempt from sales tax.

E. Transportation Charges

The sales tax imposed by Revenue and Taxation Code section 6051 is measured by gross receipts. Gross receipts include the cost of transportation of the property except as excluded by statute. Rev. & Tax. Code § 6012(a)(3). Thus, transportation charges are taxable unless specifically excluded by statute.

The exclusion requirements are set forth in Revenue and Taxation Code section 6012(c)(7). Assuming that your business is not delivering the pamphlets by its own transportation facilities, a transportation charge is not taxable if:

1. The transportation charge is separately stated in an invoice, bill, statement, contract, etc.;
2. The transportation charge does not exceed your cost for the transportation; and
3. The transportation is from your business or other point from which shipment is made directly to the purchaser.

If a separately stated charge is designated "postage and handling," only that portion of the charge which represents actual postage may be excluded from the measure of tax under this exclusion. Regulation 1628(a). With respect to a handling charge, all of it is presumed taxable unless you keep sufficient records showing which part of the charge represents handling for the diet analysis report and which part represents handling for the taxable pamphlets.

If we can be of further assistance, please do not hesitate to write to us again.

Sincerely,

Elizabeth Abreu
Tax Counsel

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