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December 9, 1992

Ms. A--- DeA---  
State and Local Tax Group  
E--- & Y---  
XXX --- Street, Suite XXXX  
--- ---, CA XXXXX

Dear Ms. DeA---:

This is in reply to your October 6, 1992 letter regarding the application of sales tax to the following facts you described:

"Our client operates an on-line computer service (the 'Service') for the buying and selling of consulting services, software and information. The Service links information sellers with information buyers through the seller's and buyer's personal computers and a host computer system the taxpayer maintains in California.

"Our client's contact with the State of California will consist primarily of mailings, advertisements in magazines and telephone connections. Our client may make periodic appearances at conventions, trade shows and users group meetings, where he may give away free access and demonstration software. This software, which is necessary to obtain access to host computer, will be given away free of charge as promotional material in computer stores and other venues throughout the states.

"Both buyers and sellers access the Service using their own computer and a modem. The information is then delivered electronically over the telephone line to the buyer's personal computer. In all cases information is transferred electronically without the transfer of Tangible Personal Property by our client. By providing a forum for the buyer and seller to meet, our client acts as a broker.

"Sellers of information must write synopses of the information product they are offering, assign a price and post it electronically on the host computer. In some cases, the data consists of an electronic copy of an existing document. In other cases, the vendor may offer custom services.

"The buyer obtains a perpetual, personal license to download and make one electronic or printed copy for his personal use of any material the buyer purchases. In addition, the buyer may gain access, without charge, to any material already purchased for as long as the material is available on the service."

You go on to note the buyer and seller negotiate when payment is due. Your client mails the billing to the buyer's address. The buyer pays your client, and your client pays the seller. You further note your client derives its revenue by separately stating the following charges to the buyers and sellers:

- "1) transaction fees ranging from 10-40% of the sales price (seller only),
- "2) connection charges of \$.09 per minute on-line (both buyer and seller),
- "3) a one-time new account sign-up fee, currently \$35 (both buyer and seller),
- "4) monthly service fees, currently \$8 per month (both buyer and seller),
- "5) storage fee based on the quantity of information stored on the host computer (seller only)."

You asked whether any of the activities establish nexus between your client and the State of California. Yes, if your client's activities qualify the client as a retailer, then we believe that, by maintaining the host computer system in California, your client occupies a "place of business in this state." Under Revenue and Taxation Code section 6203, subdivision (a), your client would be engaged in business in this state.

You asked whether the following charges would be subject to sales or use tax:

- "1) Sale of consulting charges invoiced by client if the results are sent electronically through the computer?
- "2) Prewritten text sold electronically through the computer and invoiced by client?
- "3) Other information, such as computer software graphics, sound, templates, invoiced by taxpayer?"

Sales tax applies to the retail sale of tangible personal property in this state. (Rev. & Tax. Code § 6051.) Use tax applies to the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state. (Rev. & Tax. Code § 6201.)

We have taken the position that tax does not apply to the transfer of information by electronic telecommunications from a remote location. (Sales and Use Tax Reg. 1502, subd. (f)(1)(D).) We assume that, in the three situations noted above, no tangible personal property is sent to the buyer.

"4) Would taxability change if the seller mailed a hard copy of the information directly to the buyer? (Our client has no control over transactions outside the Service, as this would be.)"

If the person you describe as the "seller" sends a hard copy of information to the buyer, the entire charge would be subject to sales or use tax. Although you conclude your client acts merely as a broker, we do not have sufficient information to determine whether we agree with that conclusion. Depending on the facts of the transaction, your client may well be the retailer responsible for payment of the sales tax or collection of use tax on the transaction.

"5) Monthly access fees paid to our client by both buyer and seller?"

"6) On-line connection fee paid to our client by both buyer and seller?"

Assuming you are correct that your client is not the retailer of any tangible personal property, the charges for the seller's and buyer's remote access to the computer by telecommunications are not subject to tax.

"7) Storage fees paid by the seller for storing data on the host computer."

Your client's charge for storing the seller's data on your client's computer is not subject to tax.

We hope this answers your questions; however, if you need further information, feel free to write again.

Very truly yours,

Ronald L. Dick  
Senior Tax Counsel