



STATE BOARD OF EQUALIZATION

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September 16, 1997

Mr. J--- W. H---
I--- A---, Ltd.
XXX West --- ---
--- ---, PA XXXXX-XXXX

Re: SC --- XX-XXXXXX

Dear Mr. H---:

This is in response to your August 8, 1997 letter asking how tax applies to various marketing research products and software sold by I--- A---, Ltd. (hereafter "I---S"). You ask our opinion with regard to three separate scenarios. For purposes of clarity, we have separately responded to each of your inquiries below.

"1) (DDD) Services:

The first category of information is I---'s drug distribution data (DDD).

"By contract with perhaps 500 drug wholesalers and distributors across the country, I--- accumulates data on the shipment of prescription drugs to retailers. Such data is typically sent to I--- on a weekly basis. The data is reviewed, checked, placed into a common format and incorporated into I---'s data bank by staff people located in ---, New Jersey. The computer hardware is located in --- ---, Pennsylvania. I--- then uses this data as follows:

"A number of interested pharmaceutical manufacturers are interested in knowing what prescription drug products are being sold, what categories of drugs are sold, and how their own sales compare to those of selected categories of prescription drugs. Such a company can contract with I--- to supply statistical estimates of such information. I--- does not have complete data on all drug shipments. However, on the basis of the reports they received described above, I--- can project a statistical sample to arrive at an estimate of the information requested. In any particular case, the drugs and market share to be tracked are determined by the specific request of the customer. I--- will acquire the needed data and produce the requested estimates, typically on a weekly basis. Thus, for example, our customer might request statistics on the sale of prescription drug A and how it

compares to all drugs in the category **Z**. To facilitate the report, I--- will usually require our customer to supply I--- with sales information. What makes DDD valuable is I---'s skill in picking the wholesalers and distributors to report to I---, its skill in analyzing the data, and its skill in projecting its estimates from the statistical samples.

“The data estimates produced by I--- for its clients is contained on computer tapes. The information is tailor-made to the clients requirements, and is given to no one else. As stated, the estimates of the prescription drugs sold and the markets analyzed are all defined by the client. I--- sends the tapes to the client, usually by Federal Express.”

California imposes a sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.)¹ When sales tax does not apply, use tax is imposed on the sales price of property purchased from a retailer for the storage, use or other consumption of that property in California. (Rev. & Tax. Code §§ 6201, 6401.)² Taxable gross receipts or sales price generally include all amounts received with respect to the sale, with no deduction for the cost of materials, service, or expense of the retailer passed on to the purchaser, unless there is a specific statutory exclusion. (Rev. & Tax. Code §§ 6011, 6012.) Gross receipts or sales price do not include amounts from the sale of a service provided the service is not part of the sale of tangible personal property. (See Reg. 1501; copy enclosed.) The distinction between the sale of tangible personal property and the transfer of such property incidental to the providing of a service is set forth in Regulation 1501:

“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”

A transaction is generally regarded as a non-taxable service where tangible personal property is furnished to a customer in order to transmit information that was specifically created, collected, or compiled through original field research in order to meet that customer's particular order. (See Reg. 1501; BTLG Annot. 515.0005.510 (10/9/96).) In that type of situation, the transfer of a *single* copy³ of the compiled information on a computer disk or paper report is considered incidental to the providing of the service and tax only applies to the sale of such materials to the seller of the service. (*Id.*) However, where a transaction involves the delivery of tangible personal property which includes information not customized to a customer's order

¹ This tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code § 1656.1; Reg. 1700(a).)

² This tax is imposed on the person actually storing, using, or otherwise consuming the property. (Rev. & Tax. Code § 6202.) A retailer engaged in business inside this state is required to collect this tax from its customers and remit it to this Board. (Rev. & Tax. Code §§ 6202, 6203.)

³ Tax applies to the charges for any additional copies of this type of report. (Reg. 1502(d)(5)(F).)

(including a report previously prepared by the retailer on a custom basis) or where property is generated from a pre-existing database created for the purpose of selling portions of that database to others, the transaction is a sale or lease of tangible personal property and is subject to tax unless an exemption otherwise applies. (Rev. & Tax. Code §§ 6051, 6201; BTLG Annots. 515.0005.510 (10/9/96), 515.1295 (2/2/93).) Information on computer disk or CD ROM is generally not considered “custom” when the seller/lessor maintains an established price based on the item ordered, the product sold or leased to the customer is generic in nature (e.g., the product is available on a state or county-wide basis), the product is delivered on a medium generally requiring mass production, or the product is generated from a seller’s pre-existing database.

We understand that I--- compiles its own, non-exhaustive database containing information on the shipment of prescription drugs by way of its contracts with numerous drug wholesalers. From this database, I--- provides its customers with information on the sale of a particular pharmaceutical in relationship to a particular category of pharmaceuticals. We understand that I--- actually develops the information it provides to its customers through statistical manipulations of the information contained in its non-exhaustive database and not by simply providing its customers with information specially selected from its pre-existing database as per a particular customer’s instruction. That is, we understand that IMS creates customized information for its customers through a significant and substantial analysis and selection processes, and that it is not merely copying or extracting portions of information from its pre-existing database and providing copies of those portions to its customers in response to their inquiries. Under these facts, we regard I--- as providing tangible personal property incidental to the providing of a service when it provides a single computer tape to its customer in response to a specific inquiry by that customer. Tax would apply, however, to any additional copies provided to a customer, or in any situation where I--- provides a significantly similar copy of information to a customer that was previously provided to another customer. (See BTLG Annot. 515.1295 (2/2/93).) In other words, where I--- incorporates a significant or substantial portion of an earlier report into another report requested by a different customer, those charges to the later customer are subject to tax.

“2) Market Research Report Services:

I--- also produces . . . Market Research Reports. Among the titles and the subjects they cover are: U.S. Drug Stores, U.S. Hospitals, National Prescription Audit, National Journal Audit, National Disease and Therapeutic Index, New Product Digest, Physician Specialty Report, Medilink, and Audatrex.

“The Market Research Report services are offered to customers on a full subscription or smaller segment basis. Our clients usually purchase the full subscription services. The full subscription service gives the customers on-line computer access to I---’s data bank of information on the chosen subject. The on-line capability enables the customer to perform individualized tabulations according to the customer’s particular specifications and requirements. Typically, the yearly costs to subscribe to a full service Market Research Report with on-line capability is \$110,000.

“A customer subscribing to a Market Research Report service also receives periodic hard-copy tabulations of data. The tabulations are incidental to the service offered by I---.

“Subscribers presently include members of the health-care industry, advertising agencies, and the Center for Disease Control (a federal agency). Selected distribution is also make to research physicians and members of academia, and certain limited data is sold to members of the investment community.”

We understand from your description that I--- customers purchasing a “subscription” to the Market Research Report receive access to I---’ database, software to access this database, and “periodic hard-copy tabulations of data.” That is, I---’ subscription fee of \$110,000 includes not only charges for accessing its database, but also charges for the software to access the database and periodic hard-copy reports. Under these facts, we regard this transaction as both a contract for the providing of a service (i.e. access to I---’ database) and a contract for the sale of tangible personal property (i.e. the software and hard-copy reports).

Our findings mean that tax does not apply to that portion of I---’ charges solely for access to its database. (I--- should separately state an amount on its invoices to its customer representing the charge for access to its database.) Tax does, however, apply to I---’ remaining charges for its hard-copy tabulations and software unless an exemption otherwise exists. We note that your letter does not provide us with enough information to conclusively determine whether the fees associated with the software and hard-copy reports are subject to tax. For example, you do not state how and in what form the software is transmitted to customers, the number of times the hard-copy tabulations are distributed to customers, or demonstrate whether or not the reports qualify as periodicals within the meaning of Regulation 1590. We have nevertheless outlined how tax may (or may not) generally apply to your company’s software and reports as follows:

A. Software. We assume that I--- provides its customers with prewritten (canned) software on tangible storage media (e.g., diskette, CD ROM, etc.) in order to access its data base. Tax applies to the entire charge for the software whether or not title to the storage media passes to the customer. (See Reg. 1502(f)(1).) Tax does not apply where the prewritten program is transferred by remote telecommunications (i.e. e-mail or computer modem) and the purchaser does not obtain possession of any tangible personal property such as storage media in the transaction. (Reg. 1502(f)(1)(D).)

B. “Hard-Copy Tabulations.” We assume that these tabulations are standardized, non-custom reports offered for sale to anyone interested in the particular information. We regard the true object of this type of transfer as the sale of tangible personal property and not the providing of a non-taxable service. (See our analysis from item one (DDD Services) above.) This means that tax applies to the gross receipts or sales price from I---’ sale of its hard-copy reports unless and exemption otherwise applies.

Your letter identifies the Sales and Use Tax Regulation defining a periodical. Regulation 1590(b)(3) provides that tax does not apply to the sale or use of a periodical which appears at least four, but not more than 60 times per year, which is sold by subscription, and which is delivered by mail or common carrier. As noted above, however, you do not indicate whether or how I---' Market Research Report qualifies as a periodical or the number of times that the "hard-copy tabulations" are provided to I---' customers. If the tabulations qualify as a periodical and are distributed at least four, but not more than 60 times per year, tax does not apply to I---' charges for its Market Research Reports. Tax does, however, apply to I---' charges for its reports where these reports do not meet the requirements of Regulation 1590 since, as discussed above, the true object of the contract relative to these reports is the sale of tangible personal property and not the providing of a service. Tax would not apply if any sale of these reports was made to the United States or its unincorporated agencies or instrumentalities. (See Reg. 1614; copy enclosed.)

"3) Dataview for Windows Software . . . :

"Dataview is a window based delivery service that provides on-line access to I--- A---'s database located in --- ---, PA. The software allows full manipulation of The National Disease and Therapeutic Index (NDTI) service. Dataview makes it easy to select, extract and format information. The software is supplied to our customers as part of the full subscription service."

As set forth above, tax applies to the charges for the transfer of prewritten software in tangible form. I--- should separately state a charge for its software and report tax measured by that amount. I--- must alternately allocate a portion of its subscription charge for the software where it does not separately state a charge.

We hope this answers your questions. If you have any further questions, please write again.

Sincerely,

Warren L. Astleford
Senior Tax Counsel

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Enclosures (Regs. 1502, 1590, 1614)
cc: Out-of-State District Administrator (OH)