STATE BOARD OF EQUALIZATION
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December 9, 1993

O--- "A." M---, Jr.
C--- T--- S---
P. O. Box XXX
---, CA XXXXX-XXXX

Re: **SR -- XX-XXXXXX**

Dear Mr. M---:

This is in response to your letter of October 22, 1993 in which you request advice as to the application of tax to several fact situations.

Your first factual scenario states:

> "1. The business is now located in Butte County (7.25% tax rate). Since I anticipate calling upon customers in other Counties to sell my diary publication, I would like to know if the sales tax rate should be at the Butte County rate, or the rate for the County of point-of-sale. Some of the sales may take place in the customers' office, while others may be by the customer sending an order coupon to me at the --- Post Office Box."

District Taxes

In California, there is a statewide combined sales tax rate of 7.25%. Any tax which may be applicable above 7.25% would be a tax adopted by a district pursuant to the Transactions and Use Tax Law. (Rev. & Tax. Code § 7251, et seq.) I will refer to such taxes as "district" taxes. Districts imposing such taxes are generally coterminous with county boundaries.

A district's sales tax is applicable to sales occurring in that district unless the sale is otherwise exempt from the district sales tax. A district's use tax is applicable to property purchased outside the district for use inside the district. If the sale is subject to one district's sales tax, but the property is purchased for use in a second district, the purchaser is entitled to a credit against the second district's use tax for any district tax paid to the first district or a credit for any reimbursement paid to a retailer for the first district's tax. (Rev. & Tax. Code § 7262(a)(4).)

The district tax exemption relevant to this discussion is the exemption for a sale of property which is shipped to a point outside the district of sale pursuant to the contract of sale. (Rev. & Tax. Code § 7261(a)(6).) Subdivision (a)(2) of Regulation 1823 (copy enclosed) provides that the district tax does not apply to gross receipts from sales of tangible personal property:

> "(B) To be used outside the district when the property sold is shipped to a point outside the district pursuant to the contract of sale, by delivery to such point by the retailer or his agent, or by delivery by the retailer to a carrier for shipment to a consignee at such point. If the purchaser uses the property in a district imposing transactions (sales) and use taxes, the use tax may apply."

Whether a retailer is obligated to collect the district use tax from the purchaser depends upon whether the retailer is "engaged in business" in the purchaser's district. As explained in subdivision (c) of Regulation 1827 (copy enclosed), "retailer engaged in business in a district" is defined to include:

> "(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in the district.
>
> "(2) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in the district under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

Thus, you should collect the applicable district tax for the county to which you are shipping if you are engaged in business in that district as defined above. Since your business is located in Butte County, you will need to remit the 7.25% combined state sales tax plus any applicable district tax for sales in Butte County (there currently is no district tax imposed in Butte County). For the items shipped into other California counties, you will be required to collect the applicable district taxes for the districts in which you have a place of business or have representatives or agents present for the purpose of selling, delivering or taking orders.

In your letter, you state that you "anticipate calling upon customers in other countries to sell my diary publication." It is unclear from your statement whether or not you have agents in these other counties for the purpose of selling, delivering or taking orders. If you or your agents or representatives are present in other counties for such purposes, you will be required to collect the applicable district tax for that county.

Please note that the Bay Area Rapid Transit District (BART) comprises the counties of Contra Costa, Alameda, and San Francisco. If you are regarded as engaged in business in any of these counties, you are engaged in business in the BART district and must collect the applicable ½% BART tax for property shipped into any of the three counties comprising BART. Each of the three BART counties also imposes an additional district tax. Whether you must collect that tax is determined by the "engaged in business" rules discussed above. For example, if you are engaged in business in San Francisco but not in Contra Costa or Alameda, you must collect the San Francisco district tax for sales into San Francisco, and the BART district tax for sales into any of the three BART counties. You would not be required to collect the other district taxes imposed in Alameda and Contra Costa counties.

The second factual scenario posed in your letter states:

> "2. I understand the sale of the publication is taxable, as would be any computer software and/or formulas. I will be adding charges for my professional services to install such software, any hardware and any training which the customer may require. I assume that if I sell these items as a lump sum package, the entire amount of sale would be taxable. If I sell software and hardware at a stated price and the installation of same and any other professional service at a separately stated price, which may, or may not be reflected on the same invoice, I assume that the installation and professional services would escape sales tax computation. Is this correct?"

Under Revenue and Taxation Code section 6012, charges for labor or services used in the installing or applying the property sold are excluded from the measure of tax. Such labor and services do not include the fabrication of property in place. Therefore, the <u>installation</u> charges are not subject to tax. However, if you fabricate (e.g. assemble) the property sold in place, the charges for such assembly are subject to tax.

For the charges related to training, subdivision (e) of Regulation 1502 (copy enclosed) provides that such charges are nontaxable except where the training services are provided as part of the sale of tangible personal property. Any training that the customer is required to obtain in order to purchase tangible personal property will be considered a part of the sale of that tangible personal property.

Your letter states that you will be providing any training that the customer may require. If your sale of the computer programs includes training services and the purchaser does not have the option to purchase the program without the services, then the charges for the training are taxable as part of the sale of the computer software, whether separately stated or not. On the other hand, when the training is optional and the purchaser may, at its option, contract for the services for a separately stated price, in addition to the charges made for the tangible personal property, then the charges for the services are non-taxable.

The third issue in your letter is as follows:

> "3. The customers will be given an option to send me their publications (diaries or logs) for calculation by my firm for a fee. I would be acting similarly to an accounting or bookkeeping type firm. I would then return the results in hard copy to a customer in a cost or expense summarization type format. Is this subject to sales tax? If so, would a separately stated charge for the computation from the actual hard copy escape, at least, a portion of the taxable amount? I feel that the actual work to perform the computations (labor) has monetary value, while the hard copy and conveyance of same will not have any monetary value to us."

Regulation 1502 addresses the application of tax to computers, programs, and data processing. Generally, the transfer of title, for a consideration, of tangible personal property, including property on which information has been recorded or incorporated, is a sale subject to tax. (Reg. 1502(c)(1).) However, subdivision (c)(5) states that charges for processing customer-furnished information are not subject to tax. Specifically, subdivision (d)(5)(C) of Regulation 1502 states:

> "Contracts for the processing of customer-furnished information usually provide that the data processing firm will receive the customer's source documents, record data on storage media, make necessary corrections, process the information, and then record and transfer the output to the customer.
>
> "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."

Under these rules, it appears that you are providing a service and the transfer of the hard copy of the processed information is only incidental to the provision of the service. Thus, the charges for these services are excluded from the measure of tax.

You are the consumer of all tangible personal property which you use in providing nontaxable services unless a separate charge is made to the customer for the materials. That is, the sale to you of the materials you use in providing the service is subject to tax but your transfer of the materials (incidental to the service) is not a sale subject to tax. If, however, you charge your customer for the materials separately, then sales tax applies to the charge made for those materials.

Also note that while the transfer of the original documents is not taxed, tax does apply to charges made for any additional copies you provide. (Regulation 1502 (d)(5)(F)).

If you have any further questions, please do not hesitate to write again.

Sincerely,

Sukhwinder K. Dhanda
Staff Counsel

SKD:plh

Enclosures - Regulations 1502 and 1822
- Tax Tip Pamphlet No. 44