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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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April 12, 1996

Mr. J--- F---
Senior Manager
D--- & T--- L---
Los Angeles Tax Services
XXXX --- Blvd.
--- ---, CA XXXXX-XXXX

E. L. Sorensen, Jr.
Executive Director

Re: Unidentified Taxpayer(s)

Dear Mr. F---:

This responds to your letter dated October 27, 1995 to Assistant Chief Counsel Gary J. Jugum requesting advice in regards to transactions by your client referred to in your letter as the "Service Provider" (Provider). You write that the advice requested is whether certain services provided by the Provider and the membership fees paid by members of the Provider are subject to California sales and use tax. As you know, since you do not identify your client, this opinion letter does not come within the provisions of Revenue and Taxation Code section 6596.

The Provider

The Provider is a corporation which provides nationwide professional services to a specific industry. Some of the Provider's customers are located in California. The Provider has an office and employees in California, but its headquarters are located outside of the state. For purposes of this opinion letter, our comments are limited to services and tangible personal property sold or consumed in California.

The Provider gathers certain industry related information, analyses the aggregate information, and then makes the information and a statistical analysis of the information available via non-customized publications and reports which it provides to its members. Generally, all members subscribing for a specific service will receive the same publications and reports. No member receives a publication or report containing solely its own information. For purposes of this opinion letter, we assume the publications and reports described above are not exempt subscriptions of periodicals as described in Regulation 1590(b)(3).

The Provider also provides sample contracts prepared by its employees for use by its members. For purposes of this opinion letter, we assume that these sample contracts are not customized for

individual members, but are forms generic for all, or portions, of the industry which the Provider services.

The Provider also will contract with an individual member to provide customized information. An example of this is a contract for the Provider to analyze a specific situation and prepare a custom report detailing findings and conclusions. A member may also purchase, through the Provider, credit reports and certain other information provided by third parties.

The Provider also makes certain information available electronically to its members. For a charge to access its computer (which is located outside of California) and the cost of the long-distance telecommunication, a member may obtain information from some Provider publications and reports. The information of third parties which the Provider makes available to its members, such as credit reports, may also be obtained electronically for a separately stated charge.

Only companies providing a specific type of product may become members of the Provider. There is a two-part membership fee consisting of a flat fee for membership for a specific state, and a variable fee based upon the member's sales of the product in the state. Companies which sell the product may not obtain the publications, reports and on-line services unless they are members.

A small percentage of the Provider's total revenues come from sales by the Provider of its publications, reports and services to non-members, primarily companies in related businesses to the business of the Provider's members. Some publications and reports sold to non-members are sold at a higher per unit price than those sold to members. For purposes of this opinion letter, we assume that the Provider does not sell any tangible personal property to either members or non-members for resale.

Membership also permits a member to purchase (for separately stated amounts) copies of the Provider's publications, reports and on-line services, to attend Provider meetings, to vote on corporate governance issues, and to receive newsletters about the industry. The Provider, upon request, will also file information on behalf of its members with regulatory bodies which supervise the members. These filings satisfy statutory and regulatory requirements imposed on the members, and may include aggregate information collected from members and results of the Provider's statistical analysis and review of the information. On occasion, the Provider also acts as a representative of the industry. For example, the Provider may make information available to legislative bodies pertinent to proposed industry-related legislation, or to the regulatory bodies which supervise the members.

Discussion

You ask four specific questions regarding the Provider, each of which is addressed below.

1. "What is the California sales/use tax treatment for separately stated charges for membership fees, publications and reports, on-line telephone services, and customized services which the Service Provider provides in connection with its services?"

Separately Stated Membership Fees. On February 22, 1996 the State Board of Equalization adopted Proposed Regulation 1584 concerning membership fees, operative January 1, 1996. The proposed regulation has been sent to the Office of Administrative Law, and its provisions are being applied administratively at this time. (Copy enclosed.)

As you know, the retail sale of tangible personal property in California is subject to sales tax, measured by the gross receipts, unless the sale is specifically excluded or exempted from taxation by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax applies to a purchaser's use of property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) Regulation 1584, subdivision (a)(1) provides that membership fees related to the anticipated retail sale of tangible personal property are includible in taxable gross receipts when either: (A) the retailer sells its products only to members and the membership fee exceeds a nominal amount, or (B) regardless of the amount of the membership fee, the retailer sells its products for a lower price to a person who has paid the membership fee than to a person who has not paid the fee.

Subdivision (a)(2) of Regulation 1584 further provides that charges for membership fees not related to anticipated retail transactions are not subject to tax. Social organizations such as country clubs and other similar organizations are recognized as being essentially service organizations. Membership fees for service organizations are not related to anticipated retail transactions even though such organizations may incidentally sell tangible personal property. At its public hearing on Regulation 1584, the Board agreed with its staff that membership fees for trade associations, which are primarily service organizations, are not subject to tax.

As described in your letter, the Provider provides its members with a variety of benefits. These benefits include collecting and analyzing industry information; making the information and a statistical analysis of it available to its members through publications, reports, and also electronically; providing customized information to individual members by contract; making third party information, such as credit reports, available to its members; sending members newsletters about the industry; holding membership meetings; filing information on behalf of members with regulatory bodies to comply with statutory and regulatory mandates imposed on the members; and occasionally representing the industry in other situations, such as before legislative bodies.

Based on your description of the benefits provided to its members by the Provider, it appears that the charges for membership fees are not related to anticipated retail transactions, but that the Provider is primarily a service organization. If so, under subdivision (a)(2) of Regulation 1584, charges for the Provider's membership fees are not subject to tax.

If the Provider is essentially a service organization, subdivision (a)(1)(B) of Regulation 1584 is inapplicable. The true object of membership is that members are entitled to avail themselves of the services provided by the Provider. The fact that members are also entitled to purchase certain tangible personal property, and that certain copies of reports or publications are occasionally sold to non-members at a higher price is immaterial to a determination that the membership fees should not be included in the measure of tax.

Separately stated charges for services and purchases of tangible personal property. Persons engaged in the business of rendering services are consumers, not retailers, of the tangible personal property they transfer incidental to the performance of the service. (Reg. 1501.) Tax applies to the sale of the property to those persons or to their use of that property. (Id.) 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 Sales and Use Tax 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....”

Thus, separately stated charges for non-customized publications, reports, and contracts, which purchasers receive in the form of tangible personal property, are subject to tax since the purchaser's primary interest is in obtaining the physical property, whether purchased by members or non-members. (Rev. & Tax. Code §§ 6051, 6201; BTLG Ann. 515.0019 (4/17/92).) However, if the publications, reports, or form contracts are delivered to the purchaser electronically by remote telecommunication, there is no transfer of tangible personal property, and, therefore, the charges are not subject to tax. (BTLG Ann. 515.1310 (3/20/92).)

On the other hand, developing customized information for a member and providing it through a custom report to the member is a service, since the true object of the contract is the service of receiving customized information, not the property produced by the service. As such, charges for the customized information and report are not subject to tax. (Reg. 1501; BTLG Ann. 515.0970 (3/20/92); BTLG Ann. 515.1360 (5/10/66).) Sales of additional copies of the report, however, would be regarded as taxable sales of tangible personal property. (Reg. 1501; see Reg. 1502(d)(5)(F).)

Your letter also indicates that payment of membership fees allows members “to receive newsletters about the industry served by the Service Provider.” We understand this to mean that the newsletter is furnished incidental to, and as one of the privileges of membership for which membership fees are paid. As such, the newsletter is regarded as consumed by the Provider, and is not a retail sale to the member. (BTLG Ann. 385.0980 (4/7/67).) Your letter does not provide sufficient information for us to determine whether the exemption provisions of Regulation 1590 (Newspapers and Periodicals) might also apply.

You also indicate that members “can also purchase credit reports and certain other information provided by third parties through the Service Provider.” We assume that the credit reports are purchased by members to use in determining the credit worthiness of their business customers. We would regard the providing of such customer credit reports as a nontaxable service. The providing of a report in the form of tangible personal property, e.g., on paper, is incidental to the credit reporting service. Since we are unaware of what you are referring to when you state that “certain other information” is also provided by third parties through the Provider, we are unable to comment on whether the separately stated charges by the Provider for same are subject to tax or not. Of course, as

stated earlier, any charges for information received by a member electronically are not for transfers of tangible personal property, and, thus, are not subject to tax.

2. "Are the informational and statistical services provided by the Service Provider subject to California sales/use tax?"

Answer: Please see the response to question 1, above.

3. "Will a separately stated charge for publications and reports, on-line telephone services, or customized services cause the imposition of sales/use tax on the informational or statistical services provided by the Service Provider?"

Answer: Please see the response to question 1, above.

4. "If the Service Provider bills its members a lump-sum charge for its services and any tangible personal property transferred, what would be the sales tax treatment related to the services and tangible personal property?"

Clearly, as already discussed, charges for sales of tangible personal property which are not exempted or excluded by statute are subject to tax. Thus, the gross receipts from the sales of tangible personal property, as opposed to services, identified earlier are subject to tax. If the Provider includes charges for sales of non-customized publications, reports, contracts, or any other tangible personal property not provided incidental to services, in a lump-sum billing, it would be necessary to identify the measure of tax for those items. The proper measure of tax for such items would probably be the amount charged to non-members for the items.

In summary, it appears from your description that the Provider is a service organization, the primary purpose of which is the provision of services to members. If this is so, the membership fees are not includible in taxable gross receipts. Reports of customized information, including credit reports of members' customers, transferred in the form of tangible personal property are incidental to the provision of the service of providing customized information, and the charges for same are not subject to tax. (Copies, however, are subject to tax.) Sales of tangible personal property, such as non-customized contracts, reports, and publications, which are not provided incidental to a service, are subject to tax.

Finally, we note that the information is quite general which you have presented to us concerning the Provider, its members and customers, and the services, tangible personal property and other benefits made available by the Provider. Please be aware that it is possible that if we had more specific facts, we would reach different conclusions than those discussed above.

Mr. --- F---

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I hope this information is of assistance. My sincere apology for the lengthy delay in responding to your letter.

Yours truly,

Sharon Jarvis
Staff Counsel

SJ:rz

Enclosure: Regulation 1584.

cc: --- --- District Administrator - (--)