

Memorandum**515.0193**

To: San Jose – District Principal Auditor

Date: January 2, 1985

From: Donald J. Hennessy

Subject: Annotation 515.0193 (CLD No. 449)

Note changes to Reg. 1528 esp. 1528(b)(2)(A) ¶ 2 and (b)(3). SPJ 12/14/01
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This is in reply to your memorandum of November 16, 1984. Your memo states three questions which we restate with our answers.

“1. Subsequent to January 1, 1982, are the exempt charges identical for both written authorization cases (§1158) and subpoena duces tecum cases (§1563)?”

Answer

No. As is stated in CLD 449’s quotations from the statutes, Evidence Code Section 1158 allows only “...actual copying costs, not to exceed ten cents (\$.10) per page, plus any additional reasonable clerical costs incurred in locating and making the records available. Such additional clerical costs shall be based on a computation of the time spent locating and making records available multiplied by the employee’s hourly wage.”

See changes to Evidence Code § 1158. SPJ 12/14/01

On the other hand, Evidence Code Section 1563 allows three types of charges:

See changes to Evidence code § 1563. SPJ 12/14/01

(a) A copying charge which is at “...ten cents (\$.10) per page for standard reproduction of documents of a size of 8½ x 14 inches or less, and actual costs for reproduction of oversize documents or documents the reproduction of which require special processing, necessarily done in responding to the subpoena together with additional reasonable clerical costs incurred in locating and making the records available. The clerical costs may be billed at the rate of ten dollars (\$10) per hour per person, computed on the basis of two dollars and fifty cents (\$2.50) per quarter hour or fraction thereof and actual costs, if any, charged to the witness by a third person for retrieval and return of records held by such a third person.”

(b) A witness fee (presently \$12) if only required to allow copying; \$35 a day if personal attendance in court required of custodian of records; and

(c) A mileage fee presently twenty cents a mile.

“2. Are charges for preparation of a letter, and preparation work thereto, taxable in connection with obtaining information regarding records which will be copied under the above Evidence Code Section?

Answer

We assume this question’s reference to “letter” refers to a written authorization letter and that by “above Evidence Code Section” you mean Evidence Code Section 1158. To my knowledge, we have not considered this question before. In our opinion, a charge for preparing and presenting a letter of authorization pursuant to Evidence Code Section 1158 is nontaxable. This is consistent with Regulation 1528(a)(2)’s provision that the charge for the preparation and service of a subpoena duces tecum is nontaxable.

“3. Concerning copies of reproducing documents, is the copying service regarded as a consumer, or is the copying service making an exempt sale of the reproduced documents?”

Answer

While “concerning copies of reproducing documents” is far from clear, we believe the answer to your question is that a copying service is making a sale of the copies except when the sale is within the provisions of Rev. & Tax. Code Section 6359.45 as amended effective January 1, 1985 by AB 2227, Chapter 1468 of the Statutes of 1984. If section 6359.45 as amended applies, then the copying service is statutorily defined as a consumer for sales and use tax purposes.

In this regard, since the time CLD 449 was issued, we have had inquiries as to a factual situation not previously covered. The new facts and our reply are contained in the attached copy of my April 26, 1984 opinion on REDACTED TEXT. I am also attaching a copy of my February 17, 1984 opinion to REDACTED TEXT which prompted our latest review of the subject of copying services.

We are in the process of preparing amendments to Regulation 1528(a)(2) (last paragraph) which will incorporate my opinions of February 17 and April 26, 1984 and CLD 449. In the interim, I am also preparing a CLD on my April 26, 1984 opinion in which I will also include our conclusion in No. 2 above, i.e., that the charge for preparing and presenting a letter of authorization is nontaxable.

In regard to Mr. REDACTED TEXT offer of assistance, we will be happy to consider any language Mr. REDACTED TEXT wishes to submit in clarification of Annotation 515.0193. We suggest he submit his language through your office so that you may include your comments as to whether his language coincides with your audit practices.

DJH:rar

Attachments

Mr. Randy Pace
Audit Evaluation & Planning

November 25, 1981

Mary C. Armstrong
Legal

Charges for records

During the course of an audit, a question arose concerning the correct application of tax to certain charges made in connection with the service or preparation of a subpoena duces tecum. Specifically, your inquiry concerns the correct application of tax to certain witness, mileage or other fees paid by a third party copying service to a hospital which are passed on to the copying service's customer.

Sales and Use Tax regulation 1528 (a)(2) provides, in part, that:

“The preparation and service of a subpoena duces tecum is an exempt service. The tax does not apply to separately stated charges made for the service even though the subpoena is served in connection with the performance of a contract to produce and deliver photostat copies of medical records.

See changes to Reg. 1528. SPJ 12/14/01

“A hospital or other person or entity which furnishes copies of records in response to a subpoena duces tecum served on it is not subject to tax with respect to witness and mileage fees or other fees received by it pursuant to Section 1563 of the Evidence Code.”

See now Reg. 1528 (b)(2)(c).

We have determined that the preparation and service of a subpoena duces tecum is a service and that tax does not apply to this charge even though the intermediary copying service furnishes taxable records. The recipient of a subpoena duces tecum may (a) charge for the records, (b) charge a witness fee, and (c) charge mileage fees. If the recipient makes copies and a charge is made, tax applies to the charge.

In the situation where an intermediary causes service of a subpoena duces tecum and is billed by the recipient for the three charges mentioned, we allow pass through of (b) and (c) without addition of tax.

The situation involving service of subpoena duces tecum is a specialized case. Ordinarily original records are furnished and no copies are made. See Evidence Code Section 1563 and 1560. Certain recipients of subpoenas, including hospitals, may send copies directly to court in

lieu of originals. Theoretically the hospital should only bill \$12 as provided by statute in lieu of witness and mileage fees. If an additional copying fee is charged, we tax this upon the assumption that there is a title transfer. We tax the copying charge whether it is made directly to the client causing issuance of the subpoena or whether it is made to an intermediary. If the copying charge is made to an intermediary, we treat the charge as a resale charge and tax the intermediary.

In the specific situation you addressed charges identified as “Fee & Advance” in the amounts of \$12.75 to \$15.75 were invoiced to the customer. The auditor was told the “Fee & Advance” was paid to the doctor and/or hospital for producing the records. To the extent the “Fee & Advance” is limited to the \$12.00 fee set by Evidence Code section 1563 we will consider it nontaxable and the copying service may pass the fee on to its customer without the addition of tax. We will consider any amounts paid over \$12.00 to be taxable when passed on to the customers.

We note that the above discussion is applicable only in those situations involving a subpoena duces tecum. Any fees, advances, or other access charges made in connection with service of a subpoena or copying hospitals records pursuant to Evidence Code 1158 are not exempt from tax when passed on to the customers of copying services.

If you have further questions concerning this matter, we will be happy to discuss them with you.

MCA:ba