



STATE BOARD OF EQUALIZATION

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August 23, 1988

Mr. J--- B---
Sales Tax Accountant
R--- T---
XXXX --- --- Parkway
---, CA XXXXX-XXXX

R--- T--- - SY -- XX - XXXXXX
Computer program copyright royalties

Dear Mr. B---:

In your July 14, 1988 letter to the board's legal staff, you write:

“This letter is to confirm an understanding of Regulation 1502 (Amended) and to determine the proper way to seed refunds on behalf of our customers. Please confirm our understanding of the Amended Regulation that sales taxes are not collectable if the license fee or royalty payment is made for the right to reproduce or copy a program. Exempt purchases are understood to be those to which a federal copyright attaches and where the buyer has the object of publishing and distributing for consideration to third parties.

“Customers have asked us for refunds of such previously paid royalties. Before issuing refunds to our customers the Company needs to know if a credit can be taken for refunds given. Further, please let us know the earliest date such a royalty qualifies for sales tax refund, and confirm that the refunds may be claimed as credits against current sales taxes payable.”

Opinion

Regulation 1502 as amended March 4, 1988, now provides at subdivision (f)(1)(B) with respect to prewritten computer programs as follows:

“Tax applies to the entire amount charged to the customer. Where the consideration consists of license fees, all license fees, including site licensing and other end users fees, are includible in the

measure of tax. Tax does not apply, however, to license fees or royalty payments that are made for the right to reproduce or copy a program to which a federal copyright attaches in order for the program to be published and distributed for a consideration to third parties, even if a tangible copy of the program is transferred concurrently with the granting of such right. Any storage media used to transmit the program is merely incidental.”

This will confirm that tax does not apply where your transfer of a copyrighted program to your customer was for the purpose of transferring the federal copyright interest, and your customer paid license fees or royalties to you for the right to reproduce and distribute the program for a consideration to third parties. But site license fees and other end user fees remain taxable. Although these amendments to Regulation 1502 became effective March 4, 1988, these provisions are the Board’s interpretations of current law, and therefore apply retroactively to any past period not barred by the statute of limitations.

However, even if you are entitled to a claim for refund of the taxes you paid to the Board on your customer’s royalties, you cannot claim this refund as a credit against current taxes payable. Rather, you must file a claim for refund with the Board within 3 years from the due date of the return for the period for which the overpayment was made, or within 6 months from the date of overpayment, whichever date expires the later. (Revenue and Taxation Code Section 6902). In the claim, you must set forth all the grounds or reasons which you consider entitles you to the refund. Your claim should be sent to the Board’s Audit Review and Refund Unit, at the address given above, and should include all of the documentation necessary to support your claim for refund. If the Board grants a refund of sales taxes, you will be required to return the amount refunded to your customers as excess tax reimbursement. (Regulation 1700(b)). It may be that what you collected from your customers was not sales tax reimbursement, but use tax, since the use tax, not the sales tax, is ordinarily imposed on license agreements where title to the program is not transferred. In this case, either you or your customers may apply for the refund and the Board would refund the use tax to your customer regardless of who files the claim.

I enclose a copy of Regulations 1502 and 1700 for your information. Please feel free to contact me if you have any further questions or comments about this letter.

Sincerely

John Abbott
Tax Counsel

JA:jb
Enclosure