



STATE BOARD OF EQUALIZATION

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March 29, 1996

Mr. L. J. K---, Publisher
 S--- T--- I---
 P. O. Box XXXXXX
 ---, CA XXXXX-XXXX

**Re: *Taxation of Electronically Delivered
 Goods and Services in California
 K--- P--- Inc.
 SR - XX-XXXXXX***

Dear Mr. K---:

This is in response to your January 5, 1996, letter in which you inquire of the tax application to electronically delivered goods and information. Omitting the footnotes to that letter, you state as follows:

“I am the publisher of the *S--- T--- Letter*, a monthly newsletter. As the title implies, this publication deals exclusively with taxes on software transactions. Recently, we have started to receive numerous requests from subscribers seeking advice on two points:

1. They want to know how to handle tax liability for goods and services delivered electronically; and
2. They want to know what advice they should give their customers about any potential tax liability.

“The following hypothetical illustrates their problems. It is based upon **current** methods of doing business over the internet:

“I--- P--- Company, is a clip art publisher located in your state. For a \$50 a month fee, it provides a monthly sample of new clip art to its customers. Once the customer finds a clip art it likes, it must purchase the right to use the clip art separately. The clip art samples are provided in three formats:

1. Customer one subscribes to a monthly clip art diskette which is mailed directly to the customer's place of business located in your state.
2. Customer two subscribes to an electronic clip art newsletter which is only available to customers of America On-Line, CompuServe, or Prodigy. (Since these services have local phone numbers in each state, they themselves have nexus with your state.) The clip art sample is emailed directly by I--- to the customer's email address, e.g., cust1@aol.com. I--- is paid via check, credit card, electronic cash, etc. I--- has no way of knowing where customer two resides.
3. Customer three is granted limited access to I---'s World Wide Web Home page. As with customer two, customer three either pays via check, credit card or electronic cash and I--- has no way of knowing where customer three resides. The subscriber using her/her own computer and internet account types in I--- Web page address (e.g., <http://I---.com/jn11>), provides his/her subscriber id and is then allowed access to the new clip art. The customer has the option of (1) just examining the clip art on the screen, (2) downloading a specific piece of sample clip art for further review, or (3) downloading the entire month's issue. I--- will not know if the customer just views the clip art on screen or downloads it downloads any article as this is a feature of the customer's software, not I---. Further the customer may not even know what state or country I--- is located. . .

"Also, at this time I would like to know if your office or state has issued any regulations, statutes, administrative determinations, opinions and the like dealing with the above topics. If so, please send me a copy of them.

"This information will be reported to our subscribers. They will use it to comply with your tax law and advise their clients."

Revenue and Taxation Code section 6596 provides the only basis for relief from tax when a taxpayer reasonably relies on written advice from the board. The primary conditions to qualify are that the request for opinion must be in writing and must disclose all relevant facts, including the identity of the taxpayer. Since your question relates to the transactions of unidentified persons, this letter does not come within section 6596.

Revenue and Taxation Code section 6051 imposes a sales tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. Section 6006 defines "sale" as "(a) Any transfer of title or possession . . . of tangible personal property for a consideration," and section 6007 defines "retail sale" as "a sale for any purpose other

than resale in the regular course of business." When sales tax does not apply, use tax applies to the use in California of tangible personal property purchased from a retailer for use in California. (Rev. & Tax. Code §§ 6201, 6401.) Neither the sales nor the use tax applies to charges for services not constituting sales of tangible personal property. (Sales and Use Tax Reg. 1501.)

Tax applies to the sale of graphics in the form of tangible personal property such as paper or computer diskette. Tax does not apply to the transfer of graphics solely by electronic transmission. For example, if you send artwork to a client by modem or post the artwork on an electronic bulletin board and do not send the recipient any tangible personal property, your transaction is not a sale subject to sales tax. (Bus. Taxes L. Guide Annot. 120.0050, 2/8/92.) A charge solely for on-line access is not taxable because such on-line access does not involve the transfer of tangible personal property and is not otherwise a sale of tangible personal property under the Sales and Use Tax Law. (Sales and Use Tax Reg. 1502(f)(1)(C), copy enclosed.)

You posed three questions, each of which I shall answer in turn for clarity's sake.

“(1) Is the sale of a sample clip art diskette subject to the sale/use tax in California?”

The sale of the artwork on the diskette by I--- is subject to tax since it is a sale of tangible personal property.

“(2) Is the sale of electronically delivered clip art subject to the sale/use or other tax in California?”

Charges for electronic transmission of clip art to a client are nontaxable provided no tangible personal property is transferred to the client. The electronic transmission by modem alone does not involve the transfer of either title or possession of tangible personal property and is, therefore, not a sale of tangible personal property under the Sales and Use Tax Law.

“(3) Is the sale of clip art samples which are only available through the vendor's World Wide Web site subject to the sale/use or other tax in California?”

If you mean that the vendor would send a diskette, paper, or other tangible personal property to a customer, the sale is subject to tax; however, if you mean that a person would merely download the image from the WWW site, tax would not apply to the charge.

You also posed questions, a. through f., which address your concerns over the lack of information of the identity and location of the purchaser of on-line information. Since there is no tax applied to the sale or use of on-line information the location of the purchaser is inconsequential. When a diskette is sold, the seller knows the location of the purchaser since that information is necessary for its delivery. As to the sale of a diskette, sales tax applies to the sale of that property in California. If your contract requires you to ship a diskette to a point outside this state and you ship the diskette to the out-of-state point, your sale is exempt from sales tax. (Rev. & Tax Code § 6396.)

Mr. L. J. K---

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You asked in question g. whether California has any other taxes (e.g., telecommunications, etc.) that might apply to the transactions described. The Board of Equalization does not administer any telecommunication excise tax that would apply with the exception of taxes or surcharges (unrelated to sales or use taxes) imposed with respect to telephone services such as the telephone user surcharge collected by the telephone utility company. If you have any questions regarding the application of that surcharge, you may direct your inquiry to Ms. Mary Armstrong, Assistant Chief Counsel, State Board of Equalization, 450 N Street, MIC: 82, P.O. Box 942879, Sacramento, CA 94279-0082, Telephone: (916)324-5589. The California Public Utilities Commission (PUC) may also administer taxes imposed with respect to such telephone service. You may contact the PUC at 505 Van Ness Avenue, San Francisco, CA 94102-3298, Telephone: (415)703-1282. In addition, local jurisdictions may also impose taxes or fees with respect to such services.

I am sorry but we do not have any publications on this matter other than those enclosed. I trust that this answers your questions. If you have any further questions, please do not hesitate to write again.

Yours very truly,

Anthony I. Picciano
Staff Counsel

AIP:cl

Enclosures (Annot. 120.0050, Reg. 1502)

cc: --- --- District Administrator