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*Executive Director*

January 17, 1996

Ms. L--- R---  
XXXX --- Drive  
--- ---, California XXXXX

Re: Sale of CD-ROMs

Dear Ms. R---:

This is in response to your letter dated October 27, 1995, regarding the application of tax to the sale of CD-ROMs in connection with an on-line electronic data transfer service provided over the Internet by your company.

You state:

“Initially we will be offering electronic data transfer only and each member will pay a monthly fee to ‘dial in’ to our service over the Internet. We will not provide the member with any software or hardware for this transaction. We understand that this service is not subject to sales tax.

Eventually we may offer a CD-ROM to members that will give them a more graphical interface when connecting to us over the Internet. Our question then is, what becomes subject to sales tax? There are two possible scenarios:

Plan 1: We charge for both the CD and the monthly connection over the Internet.

Plan 2: We give away the CD’s free of charge but still charge for the monthly connection over the Internet.”

DISCUSSION

Retail sales of tangible personal property in California are subject to sales tax, measured by the gross receipts, unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.) The term “sale” means any transfer of title or possession of tangible personal property for consideration. (Rev. & Tax. Code § 6006(a).) When sales tax does not apply, use tax, measured by the sales price, applies to the use of tangible personal property purchased from a retailer for the storage, use, or other consumption in California, unless the use is exempt from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401.) Neither the sales tax nor the use tax applies to charges for services not constituting sales of tangible personal property. (Reg. 1501.)

Charges attributable solely to the on-line electronic data transfer services provided by your company over the Internet are not subject to tax. The charges are for services not constituting sales of tangible personal property.

With regard to the transfer of the CD-ROM, under “Plan 1,” you state that your company would charge for both the CD-ROM and the monthly connection over the Internet. Under these circumstances, the transfer of the CD-ROM constitutes a sale of tangible personal property. Therefore, the amount of the total charge attributable to the sale of the CD-ROM is subject to tax.

Under “Plan 2,” you state that your company would give away the CD-ROM free of charge and only charge for the monthly connection over the Internet. We assume that you mean that the CD-ROM is transferred to a customer with no consideration given in return and no obligation on the part of the customer to purchase any tangible personal property or any services from your company. Such a transfer does not constitute a sale of tangible personal property. Therefore, the transfer of the CD-ROM is not subject to tax. This means that you are the consumer of the CD-ROM and the sale of the CD-ROM to you is the taxable retail transaction.

If you have any questions, please feel free to write again.

Sincerely,

Sophia H. Chung  
Staff Counsel

SHC:rz

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