

**STATE BOARD OF EQUALIZATION**

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October 10, 1996

REDACTED TEXT

Dear REDACTED TEXT,

This is in response to your letter dated September 9, 1996 asking whether REDACTED TEXT is required to obtain a seller's permit and collect tax or tax reimbursement on the proceeds from its contract with the Town REDACTED TEXT. You State:

"REDACTED TEXT is a Joint Powers Agency formed by the REDACTED TEXT to purchase and operate a computer system for the libraries of those jurisdictions. The computer system was purchased in part with funds donated by the REDACTED TEXT and in part by the four jurisdictions, contributing according to a formula set down in the Joint Powers Agreement. The four jurisdictions share in the operating costs of the system according to a similar formula.

"Although the Town REDACTED TEXT is not a partner to the Joint Powers Agreement, some database records for REDACTED TEXT holdings are in the REDACTED TEXT database. This is because a previous grant from the REDACTED TEXT enabled REDACTED TEXT to enter some of its records into the REDACTED TEXT computer system (which was the predecessor of the current system), and these records were loaded into the current system along with those of the participating jurisdictions.

"REDACTED TEXT has now signed a contract with REDACTED TEXT which gives the REDACTED TEXT ownership of its own records and access to the system for the purpose of updating its part of the database. (A copy of this contract is enclosed. It should be noted that REDACTED TEXT has chosen the simpler option, Option 2, of the two in the Appendix.) Sales tax was quoted on some of the prices in this contract, on the assumption that these items were taxable.

"REDACTED TEXT paid all applicable sales taxes to the vendor of the computer system REDACTED TEXT when it was purchased. However, REDACTED TEXT did not pay for the system on the basis of individual records; instead, REDACTED TEXT purchased disk space from the vendor and created the records itself by loading them into the new system

from the previous system. In a sense, then, these records represent value added, rather than a resale.

“...

You further state:

“REDACTED TEXT acts as fiscal agent for REDACTED TEXT as specified in Section XII of the Joint Powers Agreement...All of REDACTED TEXT revenue is deposited with the County, and the County pays all of REDACTED TEXT bills.”

You ask two separate questions based on the above facts. For purposes of clarity, we have separately responded to each of your questions below.

“1. Is REDACTED TEXT required to collect sales tax on computer records sold to the Town REDACTED TEXT”

Sales tax is imposed on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.)¹ When sales tax does not apply, use tax is imposed on the sales price of property purchased from a retailer for the storage, use or other consumption of that property in California. (Rev. & Tax. Code §§ 6201, 6401.)² Taxable gross receipts or sales price generally include all amounts received with respect to the sale, with no deduction for the cost of materials, service, or expense of the retailer passed on to the purchaser, unless there is a specific statutory exclusion. (Rev. & Tax. Code §§ 6011, 6012.) Gross receipts or sales price do not include amounts from the sale of a service provided the service is not part of the sale of tangible personal property. (See Reg. 1501; copy enclosed.) 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 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...”

Option two of the contract executed by REDACTED TEXT specifies that REDACTED TEXT will provide a simultaneous user port, 50,000 item records, and 1,000 bibliographic records. REDACTED TEXT is charged a one time fee for these items and is required to pay a monthly fee to REDACTED TEXT for hardware and software maintenance. Based on our October 2, 1996 telephone conversation, I understand that REDACTED TEXT does not provide any tangible personal property (i.e., computer hardware, software, or records in tangible form) to REDACTED TEXT and that the user port, item records and bibliographic records all relate to either the ability to access REDACTED TEXT computer system, or the ability to control and manipulate specific records on REDACTED TEXT hard

¹ This tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code § 1656.1; Reg. 1700(a).)

² This tax is imposed on the person actually storing, using, or otherwise consuming the property. (Rev. & Tax. Code § 6202.) A retailer engaged in business inside this state is required to collect this tax from its customers and remit it to this Board. (Rev. & Tax. Code §§ 6202, 6203.)

drive by remote telecommunications.³ We also understand that REDACTED TEXT charges to REDACTED TEXT for computer hardware and software maintenance represent only a pro-rata share of the maintenance fees charged by REDACTED TEXT computer vendor to REDACTED TEXT. That is, REDACTED TEXT computer vendor is providing the hardware/software maintenance to REDACTED TEXT and REDACTED TEXT is recouping its cost for this maintenance by collecting a pro-rata share of that amount from each participant in the Joint Powers Agreement and REDACTED TEXT. REDACTED TEXT is not contracting to provide maintenance and support to REDACTED TEXT.

Under these facts, we do not regard REDACTED TEXT as selling or leasing any tangible personal property when it only provides computer access and space on its hard drive that is accessible to REDACTED TEXT by remote telecommunications. Tax also does not apply to REDACTED TEXT pro-rata charge to REDACTED TEXT for computer maintenance since REDACTED TEXT only recapturing a portion of the fees it pays to its vendor and is not itself providing computer hardware or software maintenance to REDACTED TEXT. Thus, tax does not apply on any of REDACTED TEXT charges to REDACTED TEXT pursuant to the terms of option two.

“2. [D]oes REDACTED TEXT need its own [seller’s] permit...?”

REDACTED TEXT is not required to hold a seller’s permit for its operations described above. If REDACTED TEXT does not engage in any other business activities involving the sale of tangible personal property of a kind that would be subject to tax if sold at retail, REDACTED TEXT is not required to maintain a seller permit for its operations at this time. (See Rev. & Tax. Code §§ 6014, 6066; Reg. 1669(a).)

If you have any further questions, please write again.

Sincerely,

Warren L. Astleford
Tax Counsel

REDACTED TEXT

³ This is consistent with the language in option two stating that REDACTED TEXT is responsible for the purchase of its own local equipment and the maintenance of such equipment.