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January 27, 1994

Dear _____,

This is in response to your letter dated December 3, 1993, which is a follow-up to the letter you wrote to us on September 22, 1993 and to which we responded on November 18, 1993. You ask how tax applies to membership fees.

You state that _____ provides easy access to a wide range of nontaxable services. It also provides its members canned software. You state the canned software is not provided to each member because it is only beneficial to some of the members. You also state the retail price of the software is \$179; you purchase it for \$49 and sell it to your members for the same price, included in the membership fee of \$650. According to the membership application, the annual membership fee is \$500 and the one-time administrative fee is \$150. The contract does not separately state a fee for software and does not discount the price by \$49 if the member declines the software. In fact, the contract does not give the member that option.

You further state that the canned software is not related in any way to the other services. You provide the following list of providers which you make available to your customers:

- 1) A business Health Index Survey
- 2) Business Expense Audit
- 3) Marketing Consultants
- 4) Accountants
- 5) Research Directors
- 6) Computer Technicians
- 7) Sales Manager
- 8) Financial Analysts
- 9) Telecommunications Experts
- 10) Attorneys
- 11) Operations Managers
- 12) Management Consultants
- 13) Numerous other expert consultants
- 14) Group Health Insurance
- 15) Discounted Phone Service
- 16) Retirement plans
- 17) Employee Incentives
- 18) Seminars
- 19) Teleconferences
- 20) Workshops."

As explained in my previous letter, the question is whether you are providing property incidental to a service (which is not taxable) or whether the membership fees are for the sale of tangible personal property or relate to anticipated retail sales of tangible personal property (which is taxable).

The contract provides that members are entitled to receive, among other things, "specially priced products" from _____. For purposes of this opinion, I assume that _____ is unrelated to the _____

and that _____ receives no commission or other compensation with respect to sales made by _____ to _____ members.

Although you state that the only tangible personal property provided to your members is the software, the membership application indicates that you also provide a Business Health Index Survey, a Solutions Report, a Business Expense Audit, and a quarterly Newsletter. These all appear to be tangible personal property. There is an exemption application to the newsletter (Rev. and Tax. Code § 6367), but if you are regarded as selling the other items, the sale is subject to tax. You have not described these items but for purposes of this opinion, I assume that their value is minimal, and that, as you assert, your members join _____ for access to professional services.

Under the specific facts and assumptions stated herein, we conclude that your membership fees are not taxable and that you are the consumer of all the tangible personal property provided to your members. As such, tax applies to the sale to you of such property. Please note that if my assumptions are incorrect, our opinion would be different.

Sincerely,

Rachel M. Aragon
Staff Counsel