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April 23, 1996

Mr. D--- P---  
 Principal, H--- P--- C---  
 XXX --- Street, Suite XXXX  
 ---, CA XXXXX

SR -- XX-XXXXXX  
 Collection of District Use Tax

Dear Mr. P---:

Mr. Robert Leon of the --- District has forwarded your letter to him to the Legal Division for a response. You ask if you should collect district use tax when you install software upgrades after the initial installation.

You indicate that H--- P--- C--- (H---) is a software company with offices only in --- County but which sells its software throughout California. You do not mention how the software is sold, so for the purpose of this discussion we will assume that all sales are made in --- County. You do state that your representatives go to the clients' offices to install the software and H--- collects the appropriate use tax on the sale of the software itself. Software upgrades are, however, distributed to the clients by mail or UPS, without any subsequent visits by H--- personnel. Although H--- is currently collecting district use tax on the sale of the upgrades, it is your opinion that it is not engaged in business outside of --- County and so should not be collecting the use taxes of districts located in other counties.

OPINION

As you know, whether a retailer not located in a district (or located in a different district than the purchaser) is obligated to collect from the purchaser district use tax depends upon whether the retailer is "engaged in business" in the purchaser's district, as defined in Regulation 1827. In summary, Regulation 1827(b)(1) and (c) provide that if a retailer has either a place of business in a district, or has representatives or agents operating there for the purpose of selling, delivering, or taking orders for tangible personal property, then the retailer is obligated to collect that district's use tax from the purchaser if it ships or delivers the property to the purchaser in the district, or participates in the district in making the sale.

The sale of upgrades to software is part of the initial sale of the software itself. H--- makes regular deliveries of the software to its customers. As a result, it is engaged in business in any district in which its customers are located. (Reg. 1827(c)(2).) Since it ships the upgrades to its customers (Reg. 1827(b)(1)), it must continue to collect district use tax on the sales of the upgrades.

You also ask whether the tax result would be different if H--- shipped the software package to the customer for it to install instead of delivering and installing the package itself. You did not supply enough information given for us to render an opinion. You indicate that H--- has only one sales office--in --- County--but has customers statewide. How do people in other places find out about H---'s products? Does it have sales agents operating in other counties? Can the customer install the software itself or would people under contract to H--- have to install it? Do independent sales agents represent H---? Answers to these questions would be needed.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Senior Staff Counsel

JLW:sr

cc: Mr. Robert Leon, Senior Tax Rep., -- District