

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-06(6)S
Sales Tax
February 24, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020411A

On April 11, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Marcum & Kliegman LLP, c/o Mark L. Stone, CPA, 10 Melville Park Road, Melville, NY 11747. Petitioner, Marcum & Kliegman LLP, furnished additional information with respect to the Petition on November 19, 2002; December 15, 2003; and January 12, 2004.

The issue raised by Petitioner, Marcum & Kliegman LLP, is whether the transactions described below are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

A school qualifies as an "institution of higher education," recognized and approved by the Regents of the University of the State of New York or accredited by a nationally recognized accrediting agency or association accepted as such by the Regents of the University of the State of New York. The school is organized as a for-profit company. The school's courses of study lead to the granting of a post-secondary degree, certificate, or diploma. Students are enrolled in the school either on a part-time or a full-time basis. Any materials or books described below are required or recommended by the course instructor for a course that is part of the prescribed curriculum.

Petitioner described the following two scenarios based on these facts. Both scenarios are hypothetical situations based upon intended uses of technology now entering their final phases of testing. Each scenario is independent of the other scenario.

Scenario 1

A school is looking into purchasing software for a complex computer-driven education package. This software would allow students to complete courses at home rather than attend classes at the school. Use of this computer software would be a required part of the program. The software meets the definition of *pre-written computer software* for New York State sales and use tax purposes.

The software is designed to contain all of the information the teacher would normally present in a course. It contains the classroom material, reading assignments, homework assignments, practice problems, and the actual course tests. In addition, this software will allow a student to access an Internet chat room where a teacher from the school acts as a moderator to answer student questions relating to their course work. Students also have access to a teacher via e-mail or toll-free telephone call. Students who register to complete a course in this manner are

granted a "license to use" the software. The software deletes itself after a certain time period, which coincides with the end of the course. Students are required to supply their own computers to use the software.

Scenario 2

The next generation of textbooks will be stored on mini CD ROMs, and a high-definition textbook reader will be necessary to read the textbooks. The next generation textbook reader is a high-definition screen approximately 5 inches by 7 inches. This screen comes complete with a low-speed microprocessor and a mini CD ROM reader. Different courses will have different CD ROMs that will be inserted into the textbook reader. The school may sell the textbook reader to students separately from the CD ROM textbooks, or may furnish the textbook reader in conjunction with the sale of the CD ROMs.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i)A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7), and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration

(6) Tangible personal property. Corporeal personal property of any nature. . . . Such term shall also include pre-written computer software, whether

sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. . . .

* * *

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105(a) of the Tax Law imposes sales tax upon "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(34) Textbooks purchased by full and part time college students for their courses; provided, however, that upon purchase such a student shall present a valid student identification card, and such a textbook shall be required for a course being taken by such student at an institution of higher education. For purposes of this subdivision the term:

(i) "Textbooks" includes only those books specifically written, designed or produced for educational, instructional or pedagogical purposes.

(ii) "Institution of higher education" shall mean any institution of higher education, recognized and approved by the regents of the university of the state of New York or accredited by a nationally recognized accrediting agency or association accepted as such by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree, certificate or diploma.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term "retail sale" or "sale at retail" means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) *Resale exclusion.* (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true

cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

* * *

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

Sale, selling or purchase. (Tax Law, §1101(b)(5))

(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barters, rentals, leases or licenses to use or consume tangible personal property.

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Technical Services Bureau Memorandum entitled *Sales and Use Tax Exemption For College Textbooks*, June 5, 1998, TSB-M-98(4)S, provides, in part:

Definition of Eligible Textbooks

The exemption applies to new or used textbooks and related workbooks required or recommended for a course at an institution of higher education. The institution of higher education or the instructor of the course must have designated the book as either required or recommended. This includes course-packs and workbooks produced and required or recommended by the institution or instructor. The exemption applies whether the textbooks are printed or are on computer floppy disk or CD-ROM.

The exemption does not apply to any book (fiction or nonfiction) that is not required or recommended for a course of study at an institution of higher education.

Opinion

The following are the questions presented by Petitioner concerning the scenarios described above and the appropriate answers.

Scenario 1

1. Q. If the school purchases the prewritten software and provides it to the student as part of the course of study, does the school have to pay sales and use tax on the purchase of the software?

A. In this scenario, the school provides the student with prewritten software which allows the student to take a course independently at home. A license to use the software is granted to the student for the duration of the course. The software is designed to have all the information the teacher would normally present. While taking the course, the software provides students with everything they need to complete the course on their own, and at the end of the course the software deletes itself. Students have e-mail, toll-free telephone, and Internet chat room access to a teacher who answers questions about the course work. The software is the platform through which the lectures, course materials, homework, exams, teacher conferences, etc., are conveyed to the student, and, in effect, the software functions as the classroom for the course. The student's primary objective is to complete the course of study. The school is not selling the software to the students, but rather, provides the students with the means by which a student can complete a course of study at home. The software is of no other use to the student as evidenced by the fact that the software deletes itself at the end of the course. Although the course material is

presented to the student on the computer via use of the software, the student is earning the same course credit as a student who is presented the course material by attending class at the school. Since section 1101(b)(6) of the Tax Law provides that prewritten computer software is tangible personal property, its sale is subject to tax under section 1105(a). However, the school's charge to students is for providing a course; it is not a charge for prewritten software. The use of the software is an integrated part of the school's provision of a nontaxable educational service. The school is required to pay sales tax on its purchase of the prewritten software because the software is used by the school to provide a nontaxable educational service to the students. See section 526.6(c)(7) of the Sales and Use Tax Regulations.

2. Q. Do the students owe sales and use tax on the portion of the tuition attributable to the cost of the prewritten software?
 - A. As in question 1, the students pay a fee to take a course which includes limited instructor access and prewritten software. There is no separate charge for the software. Since section 1101(b)(6) of the Tax Law provides that prewritten computer software is tangible personal property, it is subject to tax under section 1105(a). However, as discussed in the answer to question 1, the school's charge to the students is for providing a course; it is not a charge for prewritten software. The use of the software is an integrated part of the school's provision of a nontaxable educational service. Therefore, the portion of the tuition attributable to the prewritten software is not taxable to the student.

Scenario 2

1. Q. Can the student purchase the high definition-textbook reader as an exempt college textbook or as an exempt required material?
 - A. The textbook reader purchased by students as part of the required course work does not constitute a textbook as provided for in section 1115(a)(34)(i) of the Tax Law. Therefore, the purchases of the textbook reader by the students are subject to sales tax.
2. Q If the purchase of the CD ROM textbooks includes a free high-definition textbook reader, will the sale of CD ROM textbooks be subject to sales and use tax?
 - A. The purchase of a textbook in the form of a CD ROM by a full-time or part-time student as part of required course work is eligible for exemption as provided for in section 1115(a)(34) of the Tax Law and further explained in TSB-M-98(4)S, *supra*. If the purchase of the textbook includes a high-definition textbook reader, the whole charge will be exempt if the charge to the student is the same as the charge without

the reader. However, if the charge is higher, the charge then includes an amount for the textbook reader. In this case, the entire charge will be subject to tax since it will constitute a single sale which combines both taxable and exempt items for a single charge. If the receipts for the sale of the textbook reader and the textbook are separately stated and reasonable, only the charge for the textbook reader will be subject to tax.

3. Q. Is the school required to pay sales tax on the amount it pays for the high-definition textbook reader that it furnishes to students?
 - A. If the provision of the textbook reader to the students is not subject to tax (See Answer to Question 2 of this scenario), the school must pay sales tax on its purchase of the textbook reader. See section 526.6(c)(4) of the Sales and Use Tax Regulations.

If the provision of the textbook reader to the students is subject to tax (See Question 2 of this scenario), the school's purchase of the textbook reader is not subject to tax because it is a purchase for resale.

DATED: February 24, 2006

/s/

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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.