

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-91 (9)S  
Sales Tax  
January 15, 1991

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900911C

On September 11, 1990, a Petition for Advisory Opinion was received from Answer Systems, Inc., 21050 Vanowen Street, Canoga Park, CA 91304.

The issues raised by Petitioner, Answer Systems, Inc., are whether the sale of computer software and the receipts from maintenance agreements supporting such software are subject to New York State and local sales and use taxes.

Petitioner is a manufacturer of application software. It analyzes a given customer's particular requirements and modifies its software to adapt it to the customer's environment. In addition, Petitioner provides optional annual maintenance agreements which provide the customer with technical assistance over its telephone "hot line" and updates of new releases of its software, should any be released during the annual maintenance period.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property. Section 1105(c)(3) taxes installation, maintenance and repair of such property. For sales tax application, computers and peripheral devices commonly described as "hardware" are considered tangible personal property.

The tax status of receipts from computer program ("software") sales and services is explained in Department of Taxation and Finance Technical Services Bulletin 1978-1(S), issued February 6, 1978:

Software [means] instructions and routines which, after analysis of the customer's specific data processing requirements, are determined necessary to program the customer's electronic data processing equipment to enable the customer to accomplish specific functions with his EDP system. To be considered exempt 'software' for purposes of this bulletin, one of the following elements must be present:

A. Preparation or selection of the program for the customer's use requires an analysis of the customer's requirements by the vendor.

or

B. The program requires adaptation, by the vendor, to be used in a specific environment i.e., a particular make and model of computer utilizing a specified output device. For example, a software vendor offers for sale a pre-written sort program which can be used in several computer models. Prior to operation, instructions must be added by the vendor which specify the particular computer model in which the program will be utilized.

The software may be in the form of:

- a. Systems programs (except for those instruction codes which are considered tangible personal property in paragraph 1 above) - programs that control the hardware itself and allow it to compile, assemble and process application programs.
- b. Application programs - programs that are created to perform business functions or control or monitor processes.
- c. Pre-written programs (canned) - programs that are either systems programs or application programs and are not written specifically for one user.
- d. Custom programs - programs created specifically for one user.

Software meeting the above criteria, whether placed on cards, tape, disc pack or other machine readable media or entered into a computer directly, is deemed to be intangible personal property for sales tax purposes, and as such its sale is exempt from New York State and local sales and use taxes. Software or programs which do not meet the criteria are subject to tax.

\* \* \*

Petitioner's software requires analysis of its customer's computer equipment and certain modifications are necessary to make its software compatible to such equipment. Therefore, the software qualifies for exemption as the type of prewritten application program outlined in paragraphs A and B, subparagraph c, above, which is considered to be intangible personal property; Astrogamma Inc., Adv Op Comm T & F, August 29, 1990, TSB-A-90(44)S.

Services involving modification of the Petitioner's software and problem solving after its installation are exempt from tax because said services are rendered in connection with intangible personal property. See Technical Services Bulletin, 1978-1(S), para. 3; Astrogamma Inc., supra.

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Accordingly, Petitioner's receipts from the sale of software at issue and from receipts for its maintenance agreements are not subject to New York State and local sales and use taxes.

DATED: January 15, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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