

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

TSB-A-92 (38) S
Sales Tax
May 11, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920127D

On January 27, 1992 a Petition for Advisory Opinion was received from Data Exchange, Inc., 140 Terry Drive #118, New Town, PA, 18940.

The issue raised by Petitioner, Data Exchange, Inc., is whether it was liable for collecting sales tax on receipts from sales of custom software, stock pricing services and trading activity confirmation services which occurred during the audit period September 1, 1988 through August 31, 1991.

Petitioner is in the business of writing custom designed software programs for the customer's specific computer environment.

In conjunction with the custom designed software Petitioner offers a software maintenance agreement under which Petitioner provides the customer with any updates and new releases written specifically for the customer's existing custom software.

Petitioner also provides a pricing service whereby the customer is furnished with the current market price of that particular customer's stocks, securities, etc. Petitioner obtains the pricing information from a third party. Petitioner collects sales tax on the receipts from the pricing service.

Petitioner also provides Affirms/confirms, which are a monthly record of acknowledgments of the customer's daily trading activity during a particular month. Petitioner obtains this information from a third party.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.--. . .there is hereby imposed and there shall be paid a tax upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons

- (3) Installing tangible personal property, . . . or maintaining, servicing or repairing 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.

For the period from September 1, 1988 through August 31, 1991 where Petitioner contracted to design a software program specifically for one user and for that user's particular computer environment, the software falls within the definition of custom software as defined in Department of Taxation and Finance Technical Services Bulletin 1978-1(S). Since the sale of custom software was considered to be the sale of an "intangible" and not a sale of tangible personal property, Petitioner's receipts from the sale of custom software were not subject to the sales tax imposed under Section 1105(a) of the Tax Law. Likewise, Petitioner's receipts from the sale of a software maintenance agreement applicable to the custom software were considered to be receipts from servicing and maintaining an "intangible" and were not subject to the tax imposed under Section 1105(c)(3) of the Tax Law.

As Petitioner's pricing service entailed furnishing a customer with the current market prices of that particular customer's stocks, securities, etc., Petitioner was considered to be providing an information service. Because the information furnished to the customer was not of a type which is considered uniquely personal or individual in nature, Petitioner's receipts from the sale of the pricing service were subject to the tax imposed under Section 1105(c)(1) of the Tax Law.

Petitioner's service of providing Affirms/Confirms, which was a record of a customer's daily trading activity for a particular month, was a service which did not fall within any of the services enumerated under Section 1105(c) of the Tax Law. Accordingly, Petitioner's receipts from the sale of such service were not subject to state or local sales tax.

It is noted that Sections 1101(b)(6) and 1101(b)(14) of the Tax Law were amended and added, respectively, by Chapter 166, Laws of 1991, effective September 1, 1991.

Section 1101 of the Tax Law states, in part:

Definitions.--

(b) 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:

(6) Tangible personal property 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) Prewritten 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 prewritten 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.

Because Petitioner's sales in the instant matter occurred prior to September 1, 1991, the amendment and addition to Sections 1101(b)(6) and 1101(b)(14), respectively, of the Tax Law are not applicable to those particular sales. However, it is noted that such amendment and addition to the Tax Law will apply to sales made by Petitioner on or after September 1, 1991, where applicable.

DATED: May 11, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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